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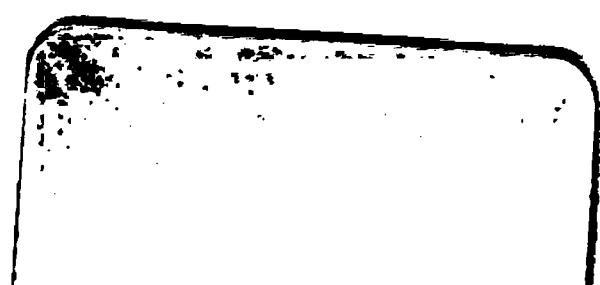
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CASES
ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS
OF THE
UNITED STATES
FOR THE
EIGHTH JUDICIAL CIRCUIT

REPORTED BY
GEO. W. M'CRARY
THE CIRCUIT JUDGE.

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OF THE
CIRCUIT COURTS OF THE UNITED STATES
FOR THE
EIGHTH JUDICIAL CIRCUIT

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REPORTS OF CASES ARGUED AND DETERMINED

IN THE

Circuit Courts of the United States,

FOR THE

EIGHTH JUDICIAL CIRCUIT.

STOUT v. THE SIOUX CITY & PACIFIC R. R. Co.

(District of Nebraska. January, 1881.)

1. **STATUTE CONSTRUED — CITIZENSHIP OF CORPORATION — JURISDICTION.**—Under a statute of Nebraska, declaring that any railroad company organized under the laws of Kansas, Missouri or Iowa, may extend its line of railroad into Nebraska, and file its articles of incorporation with the secretary of state, and shall thereupon become a legal corporation of that state, and entitled to all the rights, privileges and franchises of railroad companies organized under and pursuant to the laws of Nebraska: *Held*, that a railroad company organized under the law of Iowa, having extended its line into Nebraska, and filed its articles of incorporation with the secretary of state of that state, became, for jurisdictional purposes, a citizen of Nebraska as to all transactions of the company in that state.
2. **SAME — SAME — CITIZENSHIP.**—All questions of jurisdiction depending upon the citizenship of the parties to the suit must be determined by their citizenship at the time of the commencement of the suit.
3. **CORPORATIONS — HOW CREATED.**—It is competent for the state, by its legislation, to determine the mode of creating corporations within its limits, and it may, therefore, declare that a foreign corporation shall become a corporation of the state by building a railroad therein and filing a copy of its articles of incorporation with the secretary of state.
4. **FOREIGN CORPORATION — CONSENT TO BE SUED.**—A corporation created by one state may consent to be sued in another, in considera-

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tion of its being permitted by law to exercise therein its corporate powers and privileges. But this doctrine does not apply to a foreign railroad corporation extending its line into Nebraska, under the statute above named.

5. **SAME — AGENT.**— Where, under the statute above named, it appeared that the railroad through both states was operated by one management, *held*, that the officers and agents of said corporation in Nebraska were officers and agents of the Nebraska corporation in respect to all its transactions within that state.
6. **POWER OF STATE OVER CORPORATION.**— It is the right of each state in which a corporation transacts business to require it to become a corporation of the state under and by virtue of its own laws.
7. **PLEA TO JURISDICTION — ANSWER.**— Where defendant filed plea to jurisdiction, which was taken under advisement by the court, and at the same time left with the clerk an answer indorsed, “to be filed subject to the plea to the jurisdiction,” *held*, that the answer was not filed in such a sense as to be a waiver of the plea.

The facts are fully stated in the opinion.

E. Wakeley and J. R. Webster, for plaintiff.

Joy & Wright, for defendant.

MCCRARY, Circuit Judge.— This case is before the court on a plea to the jurisdiction, which presents for consideration a question of importance in its application to this case, and probably to other cases in this district. The facts are agreed upon, and are as follows:

Plaintiff, a citizen of Nebraska, sues the defendant, alleging that it is a citizen of Iowa, to recover damages for personal injuries sustained, as he alleges, at the town of Blair, Nebraska, on the twenty-seventh day of March, 1869, through the negligence of defendant in the management of a railroad then possessed and operated by it in Nebraska. The said defendant, the Sioux City & Pacific Railroad Company, was duly organized and incorporated under the laws of Iowa in 1864. Prior to the year 1870 it built a railroad in the state of Iowa, and also extended the same into and built a

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railroad in the state of Nebraska. On the twenty-first day of September, 1869, the defendant filed a true copy of its original articles of incorporation in the office of the secretary of state of the state of Nebraska. Defendant still owns and operates said line of railroad in the states of Iowa and Nebraska, and has had from the beginning its principal place of business at Cedar Rapids, Iowa. By an act of the general assembly of Nebraska, approved February 12, 1869, it is provided, "That any railroad company heretofore organized under the laws of the states of Kansas, Missouri or Iowa, is hereby authorized to extend and build its road into the state of Nebraska; and such railroad companies shall have and possess all the powers, franchises and privileges, and be subject to the same liabilities of railroad companies organized and incorporated under the laws of this state; *provided*, such non-resident company shall first file a true copy of its articles of incorporation with the secretary of state, and shall comply with the laws of Nebraska as to filing and recording articles of incorporation, and in all things required by law relating to railroads and otherwise in this state; and such non-resident company shall keep an office in this state, in some county in this state, in which its road is, or is proposed to be; and shall be liable to civil process, to be sued and to sue, as provided by law." Gen. Statutes Neb. 1873, p. 203. By another act of said general assembly, approved February 14, 1873, it is provided:

"That any railroad company which has been organized under the laws of the states of Iowa, Kansas or Missouri, and which has heretofore extended its line of road in this state, or built any portion of its line of road in this state, and has filed a true copy of its original articles of incorporation in the office of the secretary of state of this state, is, from the time of filing said copy of its original articles of incorporation as aforesaid, hereby declared to be a legal corporation of this state, and entitled to all the rights, privileges and franchises of railroad companies organ-

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ized under and pursuant to the laws of the state of Nebraska." Ibid. 206.

The summons is returned served upon the defendant "by delivering to, and leaving with Frank Harriman, its managing agent in this state and district, a certified copy of this summons, with all the indorsements thereon; said service was made in Washington county, state and district of Nebraska." The declaration in this case was filed April 27, 1874, and the summons was served on the eleventh day of May in the same year.

Upon these facts the following questions arise upon the consideration of the plea to the jurisdiction:

First. Was the defendant a foreign corporation at the time the suit was commenced?

Second. And if so, was the defendant an inhabitant of, or found within, the district of Nebraska at the time of the service of process in this case?

The suit was commenced and process served in April and May, 1874, at which times both the acts above named were in force—the latest one having been approved February 14, 1873. It is true that only the first of these acts was in force when the accident occurred which is the foundation of this suit, and inasmuch as I am of the opinion that the first act did not constitute the defendant a Nebraska corporation, it becomes necessary to consider whether it is the statute in force at the time of the accident, or that which is in force at the time of the service of process, that is to govern as to the forum. Upon this point I entertain no doubt. All questions of jurisdiction depending upon the citizenship of the parties must be determined by their citizenship at the time of the commencement of the suit. *Connolly et al. v. Taylor et al.* 2 Peters, 556.

This brings us to the question whether, by the last act above quoted (that of February 14, 1873), or by the two acts construed together, the defendant was created a corporation of the state of Nebraska. The fact is conceded that the

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defendant corporation was organized under the laws of Iowa, and built a railroad in that state, which was extended into and through a portion of the territory of the state of Nebraska, and that it has filed a true copy of the original articles of incorporation in the office of the secretary of state of the state of Nebraska. The act of February 14, 1873, declares in plain terms that these facts shall constitute the defendant "a legal corporation of this state, and entitled to all the rights, privileges and franchises of railroad companies organized under, and pursuant to, the laws of the state of Nebraska." It is entirely competent for the state, by its legislation, to determine the mode of creating corporations within its limits; and, if it sees fit to declare that a foreign corporation may become a corporation of the state by building a railroad therein, and filing a copy of its articles of incorporation with the secretary of state, I have no doubt that compliance with these terms constitutes the foreign corporation a domestic corporation, with respect to all its transactions within such state. It follows that the Sioux City & Pacific Railroad Company was a Nebraska corporation from and after the passage of the act of February 14, 1873, and, therefore, was such at the time of the commencement of this suit. Of course, if both plaintiff and defendant were citizens of Nebraska at the time of the commencement of this suit, then this court has no jurisdiction of the case, and the plea to the jurisdiction must be sustained. But counsel for plaintiff insists that there is a foreign corporation—a citizen of Iowa—whose corporate name is the Sioux City & Pacific Railroad Company; that it is this foreign corporation, and not the domestic corporation of the same name, that is sued; and that plaintiff should be permitted to make out, if he can, a case against the Iowa corporation by proof. His right to do this is clear enough, provided that corporation is in court, and subject to our jurisdiction. Whether it is in court or not depends upon the question whether, at the time of the commencement of this action,

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that corporation had an agent in Nebraska engaged in the management of its business upon whom service has been made. If the agent upon whom the service was made was the agent of the Nebraska corporation, it is not sufficient, for although the two corporations may be composed of the same persons, yet they are, in law, for the purposes of suing and being sued, separate and distinct. It is not impossible that the Iowa corporation might have kept an office and agents in Nebraska at the time this suit was commenced, but, upon the proofs adduced upon this hearing, I conclude that the person served was an agent of the Nebraska corporation, and not of the Iowa corporation. At all events, it has not been shown that he was the agent of the Iowa company in such a sense that service upon him in Nebraska would be a sufficient service upon that company. The act of 1875, defining the jurisdiction of the circuit courts (18 Stat. 470), provides that "No civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceedings," etc. It has been held that a corporation created by one state may consent to be sued in another, in consideration of its being permitted by law to exercise therein its corporate powers and privileges. *Railroad Co. v. Harris*, 12 Wall. 65; *Ex parte Shollenberger*, 96 U. S. 369; *Knott v. Insurance Co.* 2 Woods, 479.

But the legislature of Nebraska, instead of providing that foreign railroad corporations may extend their roads into that state upon condition that they will consent to be sued there, has seen fit to provide that such corporations shall, by extending their lines of railroad into the state, and by filing copies of their articles of incorporation with the secretary of state, become domestic corporations, with all the powers and franchises of other state corporations. Such corporations therefore being citizens of the state of Nebraska — corporations of the

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state — can be sued by citizens of Nebraska only in the state courts. It may be that plaintiff has a cause of action against the Iowa corporation, but it is not one that can be prosecuted in this court upon process served upon an agent engaged in the operation of the extended line of railroad within the state of Nebraska, and not shown to be an agent of the Iowa corporation. It is not pretended that there are two lines of railroad in Nebraska, one of which is operated by the Iowa corporation, and the other by the Nebraska corporation, but, on the contrary, it is conceded that the railroad in Nebraska is simply an extension of the Iowa road, and, upon the admitted facts, without more, we must conclude that the person upon whom service was made was employed in the operation of the line in Nebraska, and as the agent of the Nebraska corporation. The return of the marshal is not conclusive upon the defendant, and he may disprove it on the hearing of a plea to the jurisdiction. *Van Rensalaer v. Chadwick*, 7 How. Pr. 297; *Litchfield v. Barnwell*, 5 id. 341; *Wallis v. Lott*, 15 id. 567.

If the plaintiff thinks that he can, by further proof, establish the fact that the person upon whom the service was made was the managing agent of the Iowa corporation, we will withhold final judgment until a further hearing can be had; but, if he rests the case upon the proof as it now stands, the plea to the jurisdiction will be sustained.

There is a motion to dismiss the plea to the jurisdiction, upon the ground that it has been waived by the filing of an answer. It appears that sometime since, the case upon the plea to the jurisdiction was argued before Judge Dillon, and taken under advisement by him. Pending its consideration, the defendant left an answer with the clerk indorsed, "to be filed subject to the plea to the jurisdiction." I think it is within the discretion of the court to hold that the answer has not been filed, within the meaning of the rule invoked by plaintiff's counsel, and that defendant has not waived the plea to the jurisdiction.

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The motion to dismiss the plea is overruled.

DUNDY, *District Judge*, concurs.

At the May term, 1881, the cause came on for further hearing upon the plea to the jurisdiction, and, upon further proof adduced in relation thereto, a further opinion was delivered as follows:

McCARY, *Circuit Judge*.—The evidence adduced upon the trial of the issue upon the plea in abatement does not show that service in this case was made upon an agent of the Iowa corporation. It is true that the whole line is under one management; that the principal offices are in Iowa, and that the station agent upon whom service was made makes his reports to the general office at Cedar Rapids, Iowa.

The line through both states is operated by one management, one set of officers, one board of directors, one set of stockholders. This the legislature of Nebraska is presumed to have known when it enacted the statute declaring that if an Iowa railroad company extends its line into this state and files its articles of incorporation, it "shall be a legal corporation of this state." Act of February 14, 1873; G. S. p. 206.

The plain effect of this statute is to constitute the Sioux City & Pacific Railroad Company, at least for jurisdictional purposes, a Nebraska corporation, in respect to all its transactions within this state, and the agents of the company conducting its business in Nebraska are the agents of the Nebraska corporation; otherwise the statute could have no effect whatever. If the officers and agents of this corporation engaged in the transaction of its business in Nebraska are to be regarded as the officers and agents of the Iowa corporation, it follows that the statute has made it a Nebraska corporation in name only, and not in fact or in law. The same natural persons may constitute two or more distinct corporations. A corporation in Nebraska must exist by vir-

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tue of the law of this state, and if that law constitutes the defendant a Nebraska corporation, it matters not that the law of Iowa also constitutes it a corporation of that state.

It is the right of each state in which a corporation transacts business to require it to become a corporation under and by virtue of its own laws. This right having been exercised by the state of Nebraska, in a statute plainly applicable to the defendant, we must hold it a domestic corporation, and not a foreign corporation subject to the jurisdiction of this court.

Judgment for defendant upon the plea in abatement.

FIRST NATIONAL BANK OF CINCINNATI *et al.* v. KERSEY
COATES *et al.*

(*Western District of Missouri. May, 1881.*)

1. BANK CHECK.—An order drawn at Kansas City, Missouri, on a bank in New York city, to pay money to H. C. or order on demand, without days of grace, is a bank check.
2. SAME — EQUITABLE ASSIGNMENT OF PART OF DRAWER'S FUND ON DEPOSIT.—Where the depositor of a fund in a bank draws his check for a part of that fund, which is presented in due time, this is an appropriation, and an equitable assignment of so much of the fund as is called for by the check, although no action at law could be maintained upon it.
3. SAME — SAME — ASSIGNMENT FOR BENEFIT OF CREDITORS.—Where a debtor, having a large fund in bank, drew his checks in favor of certain creditors, and thereafter, before said checks were presented, made a general assignment of all his property for the benefit of his creditors, under a state insolvent law: *Held*, that the checkholders who presented their checks and demanded payment, while the funds remained in the hands of the bank, were entitled to payment as against the assignee. The checks amounted to an appropriation of so much of the fund on which they were drawn, and, to that extent, it did not pass to the assignee.
4. PRESENTATION OF CLAIM TO ASSIGNEE — ELECTION OF REMEDY.—The presentation by the checkholders of their claims to the assignee, and his allowance of them, and their receipt of dividends under the assignment, was not the election by them of a remedy which prevents a recovery in this case.

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In equity.

The Mastin Bank was a banking corporation at Kansas City, Missouri, and, at various dates between the twenty-seventh day of July and the second day of August, 1878, made and delivered to the complainants in these cases its drafts or checks on the Metropolitan National Bank of New York.

These instruments were in the following form, differing from each other only in dates, name of payee, and amount:

"\$1,979.50. STATE OF MISSOURI. No. 196219.

"THE MASTIN BANK,

"KANSAS CITY, MO., Aug. 2, 1878.

"Pay to the order of H. Colville, cashier, nineteen hundred and seventy-nine dollars and fifty cents.

"D. O. SMART, *V. Pres't.*

"TO METROPOLITAN NATIONAL BANK, NEW YORK."

On the third day of August, 1878, the Mastin Bank made an assignment to the defendant Coates of all its property and effects, for the equal benefit of all its creditors, in conformity to the laws of the state of Missouri relative to voluntary assignments.

On the morning of August 5th, before business hours, the Metropolitan National Bank was notified of the assignment by a telegram from the assignee. At the time of receiving this notice, the last named bank had in its hands on deposit, to the credit of the Mastin Bank, about \$57,000. It had for many years been the New York correspondent of the Kansas City Bank. After the receipt of this notice it paid no drafts drawn by the Mastin Bank. Those on which these actions were based were presented for payment on the fifth, sixth and seventh days of August; payment of them was refused, and they were protested.

In September, 1878, the funds so on deposit in the Metropolitan Bank were by it turned over to the defendant Coates as assignee. The assignment law of Missouri provides that all claims against the assignor shall be presented to the as-

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signee for allowance on days to be fixed by him. At that time the complainants presented their drafts, which were allowed by the assignee as general claims against the estate, to be paid *pro rata*. The complainants made no objection to the allowance in that manner, but afterwards accepted two dividends from the assignee, declared by him on all claims alike, for five and twelve per cent. respectively. Subsequently these bills were filed, to have a trust declared in favor of the complainants, upon the funds so turned over to the assignee, and for payment in full of their drafts out of such funds.

There were about \$80,000 of unpaid outstanding drafts drawn on the Metropolitan Bank, and actions similar to these, involving in all about \$22,000 only, had been brought at the time of this hearing.

For the assignee, it was insisted that the money received by him from the New York bank belonged to the general funds of the estate, and that the complainants must come in as general creditors; and further, that the presentation of their claims to the assignee, his allowance of them as general demands, and their acceptance from him of dividends on such allowances, constituted an election on their part to be treated as general creditors, and that such election was a complete bar to the relief sought by these bills.

Gage & Ladd, for complainants.

Pratt, Brumback & Ferry, for respondents.

MILLER, *Circuit Justice (orally)*.—My first impression was, that the paper which is called indifferently a draft, a bill, and a check, and on which these actions are founded, was in the nature of a bill of exchange, and not in the nature of a bank check; but the authorities presented have satisfied me that I was wrong. Even an inland bill of exchange, payable on demand, without days of grace, is a check of one bank on another, and, whatever may have been

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my original opinion, the authorities have settled that, and I must hold this paper to be a bank check.

I think the authorities have also settled — perhaps not with unanimity, but with such weight as to guide us here — that a bank check is drawn directly against money in the hands of the bank, which belongs to the drawer of the check as depositor. Not that any particular money is his, but he has funds in the bank against which he draws that check. If he has no funds, his check amounts to nothing. It is therefore an order to pay the holder so much out of my money in your hands. These authorities say it is an appropriation of that much of the fund. The nature of the transaction is this: I have so much money in the bank; to be sure, it is the bank's money, but it is a fund deposited to my credit. I draw a check in favor of A. B. for \$100; that is a direction to the bank to pay A. B. \$100 out of that fund, and the books call that an appropriation of that much of it.

The question is, whether this is an appropriation in equity of that much of that fund in favor of the payee, or a mere obligation of the drawer. It is said it is not the former, because the payee or holder of the check cannot bring suit against the bank for the money, and, therefore, it is not an equitable assignment of that much of the fund. But that argument is founded on a misconception, or want of proper understanding of the doctrine of equitable assignments. The very word "equitable assignments" is used because the assignment is only recognized in a court of equity, and not in a court of law. If it were recognized in a court of law, it could be enforced there, and we would never have heard of any such word as "equitable assignment." Therefore it is an assignment of that much of the debt which a court of equity will recognize and a court of law will not. The reasons for this are obvious. One reason, as stated in the argument here, was, that there was no privity between the payee of the check and the bank on which it was drawn. And that is true. At law there is no such privity. Another rea-

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son is, that a man may owe another several thousand dollars, which is due, or to become due, and the creditor may draw in various sums and at various times for that money, which, between the parties, is intended as an appropriation of that much of the fund. But the drawee, or the man who holds the fund, says, "I don't want to be annoyed with all these drafts. I owe the drawer \$5,000, due the first of November, and I will make the payment, once for all, to him. I will not be troubled with twenty or thirty creditors, instead of one." In law that is his right; but a court of equity looks at it differently. It says, here is a fund that originally belonged to A., but there are claims against it of B., C., D., E. and F., of which the debtor has notice, and they can have these amounts of money appropriated to them. That is the difference between the powers of a court of law and a court of equity, and that is why these are called equitable assignments. Courts of equity say they are a lien upon the fund, which they will enforce.

The fund has been transferred to Mr. Coates, and he is now the holder of it, and the court can get hold of Mr. Coates, and he holds subject to this liability. This fund, having been appropriated by these checks, duly presented, did not pass by the assignment; the fund on which they were drawn, to that extent, did not pass by the assignment, as the general property of the bank, into the hands of Coates, the assignee, but when he got it he held it subject to the lien established on it, by the drafts of which he had notice, with demand of which he had notice, with demand of payment. The result of that is, that these drafts are, each of them, an appropriation of that much of the fund, and the complainants are entitled to recover their face, less the amounts which they have received in dividends from the assignee.

Nor was their presentation to the assignee, and his allowance of them, and the receipt by the complainants of the dividends, the election by them of a remedy which prevents a recovery here. The remedies are not inconsistent.

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There is no evidence that the assignee will ever be called upon to account for an excess of the fund. He can at any time file his bill, requiring everybody to come in with their claims for amounts unpaid.

In the case of the Reno County Bank, a question is raised whether the fact that the amount of the draft was placed to the credit of that bank on the books of the Mastin Bank did not change the relations of the parties into that of ordinary debtor and creditor. But as the transmission of the draft in favor of the Reno County Bank was accompanied by the direction of that bank to transfer the amount to its correspondent bank in New York, and as the Mastin Bank attempted to do this by its draft on the Metropolitan Bank, I am of opinion that this latter draft, or check, was an appropriation of that much of the fund of the Mastin Bank as in case of other drafts or checks.

Decrees must be rendered for complainants in each case.

NOTE.—See *German Savings Institution v. Adae*, 1 McCrary, 501; *Walker, Assignee, v. Siegel*, 2 Cent. L. J. 508; *Roberts v. Austin, Corbin & Co.* 26 Iowa, 815; *Fogarties v. Bank*, 12 Rich. L. R. (S. C.) 518; *Mann v. Burch*, 25 Ill. 85; 1 Daniel on Negotiable Instruments, p. 20; Willard's Eq. Jur. Potter's ed. 464.

HARRIS *et al.* v. THE EQUATOR MINING AND SMELTING
COMPANY.

(District of Colorado. October, 1881.)

1. MINING CLAIM — POSSESSION — LOCATION — EJECTMENT.— Though plaintiffs, who sue in ejectment for the possession of a mining claim, may not be able to show a valid location according to the mining laws in force at the time, yet they may recover, if they can show that they were in possession, holding and claiming under color of title, at the time the defendant entered. And such recovery will extend to the entire claim, and not merely to the actual area occupied.
2. PURCHASER AND LOCATOR — DISTINCTION BETWEEN.— The purchaser of a mining claim may occupy a position different from the locator —

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not as against the general government, against which nothing can avail but strict compliance with the law regulating locations; but, against other citizens seeking to locate the same ground, it may well be said that a purchaser in possession under a conveyance regular in form is in by color of title, which in time, under the statute of limitations, will ripen into a perfect right. And it seems reasonable to allow him to maintain his possession against one who seeks only to initiate a new claim to the same thing.

3. ESTATE IN MINING CLAIM.—The circumstance that a miner's estate in public lands is subject to conditions, on failure of which it will be defeated, is not controlling. In general, we apply to mines in the public lands the rules applicable to real property, as that it may be conveyed by deed, is subject to sale on execution, descends to the heir, and not to the administrator, etc.
4. DEED — BOUNDARIES IN.—Though a deed does not describe the property conveyed by metes and bounds, yet if it makes reference to a location certificate of record which contains a full and definite description of the claims, this is the same as if the description had been given at length in the deed. It matters not that the location certificate be not shown to be regular in all respects, if it gives a correct description of the property.

Ejectment to recover possession of the Ocean Wave lode, situate in Griffith mining district, Clear Creek county, Colorado. Tried at May term, 1881, and verdict for plaintiffs. Motion for new trial then made and submitted. Decided at October term, 1881.

R. S. Morrison and Hugh Butler, for plaintiffs.

H. M. Teller and E. O. Wolcott, for defendants.

HALLETT, *District Judge*.—Defendant applied in the land office at Central City to enter the Charlotte lode, and plaintiffs made adverse claim to a part of the territory as the Ocean Wave, and brought this suit in support of their claim. The claims overlap near the ends, and the area in dispute is not very large. The Ocean Wave is something more than ten years older than the other location, and a tunnel has been run nearly the whole length of the claim. At the trial there was evidence to show that the lode was discovered in the

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year 1867, and that work had been done in the tunnel from time to time thereafter until this suit was brought. Very little ore was taken from the tunnel, but several witnesses testified that the lode was well defined and clearly traceable throughout the length of the tunnel. An attempt was made to show a valid location, according to the law in force in 1867, and plaintiffs also relied on a re-location in 1875. In this plaintiffs were not successful, and they were at last forced to rely on possession only in themselves and their grantors as evidence of title. As to the matter of possession, it was shown that the tunnel was worked from time to time, and by different parties, from the date of discovery in 1867 until this suit was brought. Some of the parties in possession, and others who were not in possession, had conveyed parts of the claim, or an interest therein, to other parties named; but, as plaintiffs were unable to connect themselves with these conveyances, they were not received. One conveyance made by a master in chancery, under a decree of court, in Clear Creek county, was, however, received under the circumstances which will now be stated:

In the year 1875, and for some time prior thereto, the Leavenworth Mountain Mining and Tunneling Company was in possession of the property, and had done some work in the tunnel. They had erected buildings at the mouth of the tunnel, and appeared to have and hold undisputed possession, but whether under claim of title was not shown. In this situation of affairs, one James M. Estelle brought suit against that company in the district court of Clear Creek county, and in June, 1876, obtained a decree for the sale of the premises, to satisfy several amounts of money in the decree mentioned. The premises were sold under the decree to Estelle and Morrison, and in due time a deed was made to Estelle, Morrison having assigned to him his interest in the purchase.

Several plaintiffs claim by descent, and others by purchase from Estelle; and there was evidence at the trial tending to

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prove that they, or persons in their interest, were in possession of the Ocean Wave at the time the Charlotte lode was located in October, 1879. Upon these facts a question was presented at the trial, whether the plaintiffs, not having shown a valid location of the Ocean Wave, could claim anything in virtue of their possession of the ground in controversy, if the jury should find that they held possession at the date of the Charlotte location. And it was conceded that as to the tunnel itself, and the area covered by the buildings of the plaintiffs at and near the mouth of the tunnel, their right could not be denied. But it was contended that nothing less than a valid location could give to them a possession beyond their actual occupancy to the full extent of a claim fifteen hundred feet in length by one hundred and fifty feet in width. Upon a familiar principle, it was said, a locator of a mining claim on the public lands is required to conform to the statute and the local rules of the mining district in which his claim may be situated, in order to establish his right to a full claim, and that a grantee of the locator should be held to the same proof. This, however, embraces something more than the principle that the title to and the right to occupy the public mineral lands can only be acquired in the manner prescribed by law. Conceding that proposition, it does not follow that a locator in actual occupancy, who has been evicted by a wrongdoer, must give evidence of every fact necessary to a valid location in an action to recover possession. Not on the ground that the essentials of a valid location are in any case to be omitted, but that, in support of undisturbed possession, long enjoyed, a presumption may in some cases arise that the location was at first well made. The statute of limitation, enacted by the state and recognized in the act of congress, is founded on this principle. If, in this state, the practice in ejectment for mining claims has been to show all the steps of a valid location in cases of actual occupancy and possession in the plaintiffs, it has never been declared that such proof is in all such cases indispensable.

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It is not necessary, however, to discuss the point at length, for it is clear that a purchaser may be in a different position from the locator of the claim, not as against the general government, with which nothing can avail but strict compliance with the law regulating locations, but as against other citizens seeking to locate the same ground, it may well be said that a purchaser in possession under a conveyance regular in form is in by color of title, which in time, under the statute of limitation, will ripen into a perfect right. And it seems reasonable to allow him to maintain his possession and his right against one who seeks only to initiate a new claim to the same thing. In doing so, the regulations respecting locations are not at all relaxed, nor is any condition on which the estate is held set aside. A presumption is indulged that the location was regularly made in the first place, and the party in possession is allowed to remain so long as he shall comply with the conditions on which he holds the estate. The circumstance that a miner's estate in the public lands is subject to conditions, on failure of which it will be defeated, is not controlling. In general, we apply to mines in the public lands the rules applicable to real property, as that it may be conveyed by deed, is subject to sale on execution as land, descends to the heir of the claimant, and not the personal representative of his estate, and so on. No reason is perceived for denying the force and effect of the rule under consideration as applicable to such property. This view is accepted in California, and I have not found any authority against it. *Atwood v. Fricot*, 17 Cal. 38; *Hess v. Winder*, 30 Cal. 349.

The deed from the master in chancery to Estelle does not give the boundaries of the claim, without which, according to the authorities cited, it would have no effect to extend the possession of plaintiffs beyond the parts actually occupied by them. But reference is made to a location certificate of record, which contains a full and definite description of the claim, which is the same as if the description had been given

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in the deed. It matters not that the location certificate was not shown to be regular in all respects. If it gives a correct description of the property, such description is, by reference, incorporated in the deed.

The charge to the jury, of which defendant complains, was in substance that possession of the Ocean Wave by plaintiffs at the date of the Charlotte location should extend to the limits defined in the master's deed to Estelle, and would defeat an adverse location during such possession. This, of course, was subject to proof of a lode in the Ocean Wave ground, of which there was evidence. The proposition, as stated, is believed to be correct, and the motion for new trial will be denied.

ERHARDT v. BOARO *et al.*

(District of Colorado. September, 1881.)

1. **DISCOVERY — LOCATION — TIME ALLOWED.**— Upon the discovery of a lode bearing silver in the public lands, a citizen is entitled to locate a full claim, and he has the time allowed by law to complete the location.
2. **NOTICE — HOW MADE.**— A notice posted at the point of discovery, specifying the nature and extent of his claim, will protect the locator's right for the time allowed by law in which to complete the location, although he may be absent from the claim during part of such time.
3. **SAME — MUST SPECIFY EXTENT OF CLAIM.**— But if he fails to specify, in his notice of discovery and claim to the ground, the extent of his claim, as that it extends a certain distance from the point of discovery in a direction named, it will relate only to the place where it stands. As against others afterwards locating in the vicinity, it will cover only ground necessary for sinking a shaft.
4. **ESTOPPEL — TRESPASSER.**— One who goes on ground taken up by another for mining purposes during the temporary absence of the first locator, and excludes him therefrom, and thereby prevents the first locator from completing his title, shall not be permitted to allege any defect in that title.

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Ejectment for a mining claim in the county of Dolores, called by plaintiff Hawk lode, and by defendant Johnny Bull lode. Plaintiff alleged a location begun in June, 1880, by one Thomas Carroll, who was employed by plaintiff to search for lodes, under an agreement to give plaintiff four-fifths interest in all locations made by him, Carroll retaining one-fifth for himself. Carroll testified that he found at the place in controversy, on the surface of the ground, indications of a lode, and, with a pick, made an excavation a foot or eighteen inches in depth, which disclosed a lode very clearly, and that he planted there a discovery stake, claiming the lode for plaintiff and himself. The notice on the stake was in the usual form, except that nothing was declared as to the length of the lode, or its extent in either direction from the point of discovery. The stake was set up on the seventeenth day of June, and Carroll returned to the place about the first of August thereafter, with intent to resume work and to sink the shaft ten feet or more, and complete the location. Finding the place occupied by Boaro and Hull, two of the defendants, he was deterred from any attempt to regain possession by threats of violence from them. The threats were not made to Carroll, but were communicated to him by others. Aside from the testimony of Carroll himself, to the effect that the threats were communicated to him, there was nothing to show that they were made during the time for completing the location; but some witnesses testified that they heard threats from the parties in possession after that time. Carroll also said that the situation of the defendants as "jumpers" induced him to believe that they would resist his claim with force. At all events, he made no demand for the premises, nor did he attempt to go on with the work after he discovered that they were occupied. He applied to plaintiff's agent in Rico for assistance to regain possession, which was denied him, on the ground that legal steps would be taken for that purpose. Carroll's testimony was supported by other witnesses on some points, which it is

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not necessary to enumerate. A surveyor employed by defendants to survey the ground for relocation, without the knowledge of defendants, set up boundary stakes for plaintiff's Hawk location, and gave a description of the premises, which plaintiff inserted in a certificate of location, and filed it for record within the time limited by statute for making and recording such certificate. Neither Carroll nor plaintiff sunk any discovery shaft on the ground in dispute, or posted a notice of discovery, except that mentioned by Carroll as having been set up on the seventeenth of June.

At the close of plaintiff's testimony, defendants moved for judgment of nonsuit, on the ground that plaintiff had not shown a location complete under the statute. Counsel urged that plaintiff could have no right to the possession except on proof of all things necessary to a valid location done within the time limited by law; and this, although it should appear that defendants prevented Carroll from going on to complete the location, by threats or by occupying the ground. And it was said, that to give plaintiff a right of action would be to declare that the work done by defendants in sinking a discovery shaft and putting up notice of discovery should inure to plaintiff's benefit.

The court said that no such presumption could be indulged, and that it was not necessary to assume that the work had been done by any one. If, as contended by plaintiff, defendants took possession of the ground with knowledge of Carroll's prior location, and prevented Carroll and the plaintiff from going on with the work, they should not have advantage of their own wrong. Under the circumstances charged, the defendants could not be allowed to deny the force and validity of plaintiff's location in any way. The motion for judgment was denied.

Defendant Boaro then testified that he made the Johnny Bull location in the last days of June, 1880. That he found nothing on the surface of the ground to indicate a lode, nor any such excavation or stake as that mentioned by the wit-

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ness Carroll. That, upon all the territory covered by the location, there was nothing whatever, at the time he went on the ground, to show that it had been located on the 17th day of the same month, or at any time. This witness was supported in some portions of his testimony by others, and, on the whole evidence, it must be said that it was very conflicting on the principal points affecting the two locations. But it was conceded that the plaintiff's, if made at all, was prior to the other in time.

In the course of the trial it became a question whether the plaintiff, on evidence of title to four-fifths interest in the Hawk location, could have judgment for the entire interest. Counsel maintained that, in an action against a stranger to the title, a tenant in common may sue for his co-tenants as well as himself. The point was not then decided, and afterwards proof was offered by defendants of certain declarations of Carroll, to which plaintiff objected that he was not bound by them. But the court said that, if the suit was brought for Carroll's interest as well as that claimed by plaintiff in his own right, the declaration should be received as affecting Carroll's one-fifth interest. Thereupon the plaintiff declared that he would maintain his action for his own interest only, and the evidence was excluded. Plaintiff asked leave to amend his complaint, to demand four-fifths interest instead of the whole, and it was allowed him.

Thomas Macon, H. C. Thatcher and J. M. Semple, for plaintiff.

Thomas M. Patterson and Julius Thompson, for defendants.

The court charged the jury as follows:

HALLETT, *District Judge*.—*First*. The first question for the consideration of the jury is as to the discovery of a lode or vein of silver-bearing ore by Carroll at the place in contro-

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versy. It is incumbent on the plaintiff to show, by preponderance of testimony, that such discovery was made. On this point there is the testimony of Carroll as to what he found there, and some evidence on both sides as to the condition of the ground in the locality. The position of the plaintiff is, that the lode cropped out at the place, and was clearly disclosed by the slight work with a pick which Carroll testifies to. The position of the defendants is, that there was not on the surface of the ground any indications of a lode, and that it was necessary to make a considerable excavation to reach the lode. They also claim that there was no excavation whatever, such as mentioned by Carroll, at the place in controversy at and before the time of the location by Boaro. I am requested by plaintiff's counsel to add that it is not essential to the validity of a discovery that the mineral-bearing rock should be found in place.

If the outcrop of the vein or body of mineral-bearing rock is found on the surface, the law allows the discoverer the period of sixty days from the date of his discovery for showing the vein or body of mineral-bearing rock to be in place at a depth of ten feet or more from the surface.

That proposition is correct.

The foregoing question, on which the testimony is conflicting, you are to determine, and if, upon that, you find for the plaintiff, you should proceed to the matters hereinafter stated. If, on that point, you find for defendants, your verdict will be for them on that alone, without reference to any other matter.

Second. If you find the first point for plaintiff, a further question for your consideration is, as to the posting of notice at the point of discovery. It is incumbent on the plaintiff to show, by preponderance of testimony, as before stated, that a notice of the discovery and of the claim of the locator was put up at the point of discovery.

Notice in any other form would be as effectual probably, but, as the plaintiff claims that the notice was posted on the

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claim, it is only necessary to consider whether that method was adopted.

Carroll testifies that he posted a notice in his excavation at the point of discovery, and there is some evidence of admissions or declarations by Boaro to the effect that he found a stake there when he went on the ground. The defendants claim that no such notice was posted, and none found there by Boaro when he made his location. This is a controverted question, similar to the first stated, which you are to determine on the evidence.

If you find that notice was posted, as testified by Carroll, you should also find that it was sufficient for the purpose for which it was designed, with this modification. It is in evidence, and it seems to be conceded by plaintiff, that the notice on the stake contained no specification or description of the territory claimed by the locators, as that they claimed a number of feet on each side of the discovery, or in any direction therefrom.

In this respect the notice was deficient, and, under it, the locators could not claim more than the very place in which it was planted. Elsewhere, on the same lode or vein, if it extends beyond the place in controversy, any other citizen could make a valid location; for this notice, specifying no bounds or limits, cannot be said to have any extent beyond what would be necessary for sinking a shaft.

Third. If you find these matters for the plaintiff, a third question for your consideration is, whether defendant Boaro, in making the location under which defendants claim, went into the slight excavation made by Carroll, and there sunk his own discovery shaft, or run his own cut, making that the basis of defendants' location.

If he did so, the plaintiff having then a right to that locality as before explained, the entry of Boaro was an intrusion into his territory, for which he may maintain this action. But it should appear to you, from the evidence, that Boaro entered at the very place which had been previ-

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ously taken by Carroll, because, as Carroll's notice failed to specify the territory he wished to take, it could not refer to or embrace any other place than that in which it was planted. Possibly the rule here laid down may be applicable to the case in which a subsequent locator may sink his discovery shaft so near to that of the first locator as to prevent further work by the latter in the development of the claim. But it is not necessary to advert to that matter, for the plaintiff contends that Boaro went into the very place where Carroll made his excavation and planted his discovery stake, and there made a cut, shaft or other opening on which to found his own location.

That is the question in issue between the parties, and you should decide it on the evidence.

Fourth. These things being found for the plaintiff, a fourth question for your consideration is, whether Carroll, after discovering the lode, abandoned it.

To perfect their location, it was incumbent on the plaintiff and Carroll, as the locators of the claim, to sink a discovery shaft within sixty days after the date of location, and to do the other things required by statute within ninety days from that date. Failing in that, they would have no right whatever to the territory in controversy. And although Carroll may have intended to do the necessary work, and to perfect the location within the time limited by statute at the time he set up his stake, if he afterwards abandoned that intention the plaintiff cannot recover. It should appear to you, from the evidence, that the plaintiff and Carroll, at the time the Hawk location was made, and continuously thereafter, held and maintained the purpose and intention to complete the location, and that they were prevented from doing so by the act of Boaro and Hull in taking possession of the place in controversy, and excluding Carroll and the plaintiff therefrom. If, by the use of reasonable diligence, the plaintiff and Carroll could have obtained possession for the purpose of doing the necessary work, it was their duty to use such

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diligence. If, by demand on Boaro and Hull, they could have obtained such possession, it was their duty to make such demand. But they were not bound to attempt to do the work at any other place than that which had been selected by Carroll, nor were they bound to use force to gain possession, or even to bring an action therefor. If they were excluded by Boaro and Hull from the possession of the very place selected by Carroll for his discovery cut or shaft, with intent on the part of the latter to hold the ground against them, it is enough on this point.

Fifth. These several questions must be found for plaintiff, by preponderance of testimony, to support a verdict in his favor, for if, after one has discovered a lode, and set up a notice of his claim to it, and within the time fixed by law for doing the work necessary to a valid location, another coming to the same place and taking possession thereof, to the exclusion of the first, shall not have advantage of his own wrong; nor shall the subsequent locator in such case be permitted to allege anything against the right of the first locator.

To permit the junior locator to deny the right of the other, under such circumstances, would be to deny him all remedy, which cannot be allowed.

And, therefore, if the facts mentioned are established by the evidence, the regularity and validity of plaintiff's location shall be assumed. And if, upon the evidence, you affirm the foregoing propositions for the plaintiff, your verdict should be for him.

If you deny any or all of them, you should find for defendants.

The jury returned a verdict for defendants.

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GREENLEAF *et al.* v. DOWS *et al.*

(District of Minnesota. September, 1881.)

1. **WAREHOUSE RECEIPTS FOR GRAIN STORED—EVIDENCE OF TITLE—STATUTE CONSTRUED.**—The statute of Minnesota provides that when grain is deposited in a warehouse, elevator or other depository for storage, the same shall constitute a bailment and not a sale, and that the bailee shall execute to the person so storing the same a receipt or other written instrument, stating the amount, kind and grade of the grain stored, the terms of the storage, and, if advances are made, the words “advance made,” which receipts shall be *prima facie* evidence that the holder thereof has in store with the party issuing such receipt the amount of grain of the kind and grade mentioned in such receipt: *Held*, under said statute, that a receipt issued to an actual depositor of grain, stating that he has deposited with the proprietor of a grain elevator at Litchfield, Minn., a given quantity of a certain quality of wheat, “to be carried at the convenience of the railroad company to St. Paul or Minneapolis for storage or delivery,” was such an instrument as constitutes *prima facie* evidence of title to the amount and grade of grain mentioned therein.
2. **SAME—SAME—SAME.**—*Held* further, that a certificate stating that a depositor of grain has surrendered his warehouse receipts or elevator tickets for a certain quantity of a given grade of wheat, although issued by the proprietor of the elevator for wheat in the elevator sold by him, was not a warehouse receipt, and no evidence, under the statute, of title in the holder to any of the wheat in the elevator as against holders of such receipts as the statute recognizes.
3. **EQUITY JURISDICTION—REMEDY AT LAW.**—Where there are several depositors of grain in a warehouse, each claiming a given quantity, the aggregate of their claims being more than the whole quantity of grain in such warehouse, a court of equity has jurisdiction of a bill filed by one or more of such claimants for a discovery and an accounting between the parties, and such jurisdiction is not defeated if upon the accounting it appears that the complainants are entitled to payment in full, and might have sued at law.
4. **CONVERSION BY ONE OF SUCH CLAIMANTS—NECESSARY PARTIES TO SUIT.**—Where one of several claimants of grain in an elevator takes possession of such grain and converts it to his own use, he is liable to account to the other claimants for the full value of their respective interests therein; but before entering final decree the court will take care that all claimants of such grain, or of any interest therein, are before it.

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In September, 1879, one H. H. Harris engaged in the business of operating a grain elevator at Litchfield, Minn., a station on the St. Paul, Minneapolis & Manitoba Railway, and while so engaged he received from numerous persons for storage and handling for hire large quantities of wheat, and he also purchased wheat on his own account, which was stored in said elevator. To persons depositing wheat for storage and handling he issued receipts and tickets in the following form:

"Ticket No. 1368. H. H. HARRIS.

"LITCHFIELD, Oct. 15, 1879.

"Account of Andrew Johnson or bearer, forty-seven 45-60 bushels No. 2 wheat, to be carried at the convenience of the railroad company to St. Paul or Minneapolis, for storage and delivery, insured against loss or damage by fire.

"H. H. HARRIS, *Inspector*."

He also sold grain from the elevator on his own account, and among the purchasers from him of such grain were the respondents, David Dows & Co., who received as evidence of title to the grain so purchased certain certificates, in the following form, called "surrender certificates:"

"No. —.

"LITCHFIELD ELEVATOR, LITCHFIELD, Oct. 8, 1879.—This is to certify that — has surrendered elevator tickets for 2,000 bushels of No. 2 wheat, free on track.

"2,000 No. 2 wheat for shipment to —

"H. H. HARRIS, *Owner*."

Harris received in store from the several complainants a quantity of wheat aggregating two thousand two hundred and eighty-four and twenty-six sixtieths bushels, and issued therefor tickets in the form above given. He sold to respondents, David Dows & Co., or their assignors, to be taken from said elevator, eighteen thousand four hundred and forty and fifty one-hundredths bushels, for which "surrender certificates" were issued in the form above given.

In October, 1879, Harris absconded, leaving in the elevator

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three thousand six hundred and one and twenty-two sixtieths bushels of wheat only — not enough to satisfy the holders of the wheat tickets and the surrender certificates above described.

Respondents, David Dows & Co., brought an action of replevin to recover all the wheat remaining in the elevator, and having given bond to answer for the value of the same, as required by statute, it was delivered to them and by them converted to their own use. Upon the hearing of the replevin suit, the court held that, in order to settle all conflicting claims against the wheat, it was necessary to bring a bill in equity. See 1 McCrary, 434. This bill was accordingly filed. The prayer is that respondents, David Dows & Co., be required to bring into court the cash value of the wheat, and that the court will distribute the same according to equity among the several claimants

It is insisted, by way of defense:

First. That complainants have an adequate remedy at law, and therefore no right of action in equity; and

Second. That the wheat tickets relied upon are not sufficient evidence of title to any part of the wheat in controversy.

Complainants insist that they hold the evidence of title recognized by the statute of Minnesota, that respondents have no title, and that the suit is properly brought by bill in equity.

The statute of Minnesota to be considered is an act entitled "An act to regulate the storage of grain," approved March 3, 1876. Gen. Laws of Minn. 8th session, p. 96.

Section 1 of that act provides that whenever any grain shall be delivered for storage to any person, association or corporation, such delivery shall in all things be deemed and treated as a bailment, and not as a sale of the property so delivered — notwithstanding such grain may be mingled by such bailee with the grain of other persons, or shipped or removed from the warehouse, elevator or other place where the same was stored.

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Sections 2 and 5 are as follows:

"SEC. 2. Whenever any grain shall be deposited in any warehouse, elevator or other depository for storage, the bailee thereof shall issue and deliver to the person so storing the same a receipt or other written instrument, which shall in clear terms state the amount, kind and grade of the grain stored, the terms of storage, and, if advances are made, the words 'advance made;' which receipts shall be *prima facie* evidence that the holder thereof has in store with the party issuing such receipt the amount of grain of the kind and grade mentioned in such receipt; and any warehouseman, proprietor of an elevator, or bailee, who shall issue any receipt or other written instrument for any grain received for storage, which shall be false in any of its statements, shall be guilty of a misdemeanor, and shall, upon conviction, be punished by fine not exceeding three hundred dollars, or imprisonment in the county jail not exceeding six months, or by both fine and imprisonment.

"SEC. 5. Warehouse receipts given for any goods, wares and merchandise, grain, flour, produce or other commodity stored or deposited with any warehouseman, or other person or corporation in this state, or bills of lading, or receipts for the same when in transit by cars or vessel to any such warehouseman or other person, shall be negotiable, and may be transferred by indorsement and delivery of such receipt or bill of lading; and any person to whom the said receipt or bill of lading may be transferred shall be deemed and taken to be the owner of the goods, wares or merchandise therein specified, so as to give security and validity to any lien created on the same, subject to the payment of freight and charges thereon. *Provided*, that all warehouse receipts or bills of lading which shall have the words 'Not negotiable' plainly written or stamped on the face thereof shall be exempt from the provisions of this act."

G. L. & C. E. Otis, for complainants.

O'Brien & Wilson, for respondents.

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McCrary, *Circuit Judge*.—*First*. The several parties to this suit claim title to a part or all of the wheat in controversy, and the first inquiry is as to the validity of their claims.

The complainants claim under instruments known as wheat tickets or receipts in the form first above set out. The evidence is that they were given to actual depositors of wheat. They state, as required by the statute in plain terms, the kind and grade of the grain stored, and the terms of storage; that is to say, the grain was stored "to be carried at the convenience of the railroad company to St. Paul or Minneapolis for storage and delivery." From this I understand it was stored in the elevator to await transportation. These receipts are, therefore, in my opinion, such instruments as under the statutes of Minnesota, quoted above, constitute *prima facie* evidence of title to the amount and grade of grain mentioned therein as deposited in a warehouse or elevator.

The respondents, David Dows & Co., claim under instruments quite different in form and substance from those held by complainants. They are known as "surrender certificates," and they set forth that the parties named therein have "surrendered elevator tickets" for a certain quantity of wheat "free on the track." Harris was in the habit of buying and selling wheat in addition to the business of receiving wheat for storage and shipment, and it appears that "surrender certificates" were issued to persons to whom he made sales of wheat in the elevator. At all events, such certificates were executed to represent the wheat sold to respondents or their assignors.

There is no doubt that the proof shows a sufficient sale of wheat by Harris to respondents, provided the wheat so sold was the property of Harris. The question here is, whether these surrender certificates are competent evidence of title to grain in the warehouse as against third parties; or, in other words, are they the evidence of title to grain deposited with a warehouseman which is recognized by the statute of Min-

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nesota above quoted? The statute describes with clearness and accuracy the instrument which shall be *prima facie* evidence of title to such grain. It must be issued and delivered to the person storing the grain, and must state the amount, kind and grade of the grain stored, the terms of storage, etc. It is clear under this statute that the receipt, to be evidence of title, must be issued by the warehouseman to an actual depositor of grain. It applies only to the receipt or ticket which is issued when the grain is deposited in the warehouse or elevator. The depositor retains the title to a like quantity and grade. The statute contemplates the mixing of the grain of different depositors, and therefore does not provide for the return of the identical grain deposited. The warehouseman has no power to issue certificates or receipts to persons who make no deposit of wheat, and to make such certificates or receipts a lien on wheat actually deposited by others, and for which other receipts have been given. The assignee of a deposit receipt or wheat ticket has the assignor's title to the wheat, but the surrender certificates held by respondents are not assignments of wheat tickets or receipts. They are instruments unknown to the statute. They state that certain holders of elevator tickets have surrendered them, and that they represent a given number of bushels of wheat "free on the track" for shipment, etc. It does not appear from such a paper that any wheat remains stored in the warehouse or elevator, much less that the tickets, which under the statute represent the title, are outstanding. When the holder of the statutory evidence of title to grain in a warehouse or elevator "surrenders" it to the warehouseman, and the latter certifies the fact, there is nothing in the statute to give his certificate the force and effect which formerly belonged to the surrendered instrument. Inasmuch as the respondents deposited no grain in the elevator, they could only purchase grain therein as against actual depositors by buying outstanding certificates representing such grain, and taking an assignment thereof.

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They did not do this. In no instance did they take an assignment of the evidence of title. It follows that their claims must be postponed to those of actual depositors who present the evidence of title recognized by the statute.

Second. A question is made as to whether, upon the facts already stated, the case is one of equitable cognizance. It is insisted that, inasmuch as there is grain enough to satisfy all of complainants' demands, they have severally a right to proceed at law, and, therefore, no right to proceed in equity. It is true that when the action of replevin was before this court it was supposed by the court that all the certificates were equally liens upon the grain in the elevator, and that none of the claimants were entitled to payment in full. The question as to the effect of the "surrender certificates" was not then raised, and the court assumed that they were warehouse receipts or certificates, evidencing title, within the meaning of the statute. Although, upon further consideration, it now appears that this was a mistaken assumption, it does not follow that the jurisdiction in equity fails. It is still a case for a discovery and an accounting between the parties. Without a discovery and an accounting the court could not know that the complainants were entitled to payment in full. If one of them had sued alone at law, how could the court or a jury have determined whether he was entitled to recover the whole amount claimed? To determine that question the presence of other depositors of grain was necessary, or at least proper, and an accounting as between all such depositors, if not the only, was certainly the most convenient and adequate mode of proceeding. If the remedy in equity is more complete and adequate than that at law, and especially if it prevents a multiplicity of suits, the equitable jurisdiction can be maintained, even if there is a concurrent remedy at law. 1 Story Eq. Jur. sec. 457. Nor would it make any difference if it were admitted that the result of the discovery and accounting is to develop the fact, not before known, that the complainants might have sued at law. "In all cases where

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a court of equity has jurisdiction for discovery, and the discovery is effectual, that becomes a sufficient foundation upon which the court may proceed to grant full relief." In other words, where the court has legitimately acquired jurisdiction over the cause for the purpose of discovery, it will, to prevent multiplicity of suits, entertain also the suit for relief. *Ibid.* sec. 456. It would be a plain violation of this rule to remit the several complainants, at this stage of the proceedings, to their remedy at law. If it were necessary to discuss this question further, the jurisdiction in equity might, I think, be maintained for the purpose of preventing a multiplicity of suits, or under the head of "apportionment and contribution of a common fund among all those who have a title to a portion of it." *Ibid.* sec. 469 *et seq.*

Third. Respondents, David Dows & Co., having converted the wheat in question to their own use, are liable to the holders of warehouse receipts, or wheat tickets, such as the law recognizes, for the reasonable value of the wheat represented by such instruments, not exceeding, of course, the total value of the wheat actually seized and appropriated; but before final decree is entered it is proper to inquire whether all the holders of such instruments are before the court. It is also deemed proper to take the opinion of a master upon the question of the reasonable value of the wheat. For these purposes the case will be referred to a master, to be named by Judge Nelson, who will inquire and report at the next term:

First. Whether all persons interested in said wheat are before the court in this case; and

Second. The master will report his conclusions from the evidence as to the reasonable cash value of the wheat claimed by complainants at the time it was taken by respondents upon the writ of replevin, and also its highest market value at any time between that time and July 1, 1881.

If deemed necessary, the said master may take further testimony touching these questions.

Marshall v. The Town of Elgin.

MARSHALL *et al.* v. THE TOWN OF ELGIN.**SAME v. THE TOWN OF PLAINVIEW.***(District of Minnesota. September, 1881.)*

1. **MUNICIPAL BONDS — RECITALS.**—Recitals in municipal bonds issued to aid in the construction of a railroad, stating compliance with all the conditions precedent prescribed by law, are conclusive evidence in favor of a purchaser of such bonds, without other information than that which appears on their face that such conditions precedent have been complied with.
2. **RECOGNITION BY STATE COURT OF VALIDITY OF BONDS — SUBSEQUENT CHANGE OF RULING.**—If the law under which such bonds issued had been recognized as valid by the highest court of the state at the time, no subsequent act of the judiciary can impair their validity in the hands of innocent purchasers.
3. **WHAT AMOUNTS TO A JUDICIAL RECOGNITION OF THE VALIDITY OF SUCH BONDS.**—Where a decision of the highest judicial tribunal of the state, at the time the bonds are issued, favors the validity of the law under which they are issued, a subsequent decision impairing their validity will not be followed by the federal courts. A decision construing and enforcing such a law will be regarded as one favoring its validity, although the question of its constitutionality was not discussed by the court, especially if that question be presented in argument by counsel.

These actions are brought to recover the amount of coupons which were attached to bonds issued by the towns of Elgin and Plainview in this district, the plaintiffs being owners of the bonds and coupons, and also to recover the amount of coupons owned by them taken from bonds held by other parties, to whom the plaintiffs had sold them. The bonds and coupons were issued to the Plainview Railroad Company by the town of Plainview, March 16, 1879, and by the town of Elgin about January 1, 1879, under chapter 106, General Laws of Minnesota, 1877, and were purchased by the plaintiffs July 9, 1879, for value, and without notice of any of the matters relied on as defenses, except such as appear on their face.

Sec. 3 of the act referred to provides that no bonds shall

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be issued until a mutual agreement in relation to the construction of a railroad shall have been arrived at.

Sec. 4 enacts that a railroad company desiring aid in the construction of its road shall make a proposition in writing which shall contain a statement of the amount of the bonds of the town desired, and when they are to be delivered, which shall be filed with the auditor or clerk.

Sec. 7 declares that one mode of arriving at the mutual agreement required shall be:

“*First.* That within three months after filing a proposition the railroad company shall cause notice to be given that after a day named a petition to the proper authorities, asking them to agree to such proposition, will be presented to the resident tax-payers, and to the petition shall be appended a copy of the proposition.

“*Second.* If within four months after the filing of such proposition with such clerk . . . the railroad company shall deliver to such clerk a substantial copy or copies of such proposition so filed with such petition to the proper authorities of such town, asking such authorities to agree to such proposition, appended thereto, bearing the signatures of a majority of the persons residing in such . . . town . . . who were assessed for taxes upon real or personal estate in such . . . town . . . as shown by the last assessment roll of the district of which aid is desired, which signatures shall be verified by the affidavit of some person witnessing such signatures, then such mutual agreement for the issue of bonds by such municipality, and of the stock of such railroad company, shall be deemed and considered to have been arrived at and perfected, and thereupon such bonds shall be issued and delivered in conformity with the true intent and meaning of such proposition, and with the provisions of this act.”

Each bond contains the following recital: “This bond is issued in pursuance of a mutual agreement between said town and said railroad company, which agreement was made

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in accordance with the laws of the state of Minnesota, and through and by a proposition made by said railroad company, and duly accepted by said town, upon petition therefor signed by a majority of the resident tax-payers of said town, said agreement having been fully performed by the said railroad company on its part."

"This bond is issued in pursuance of the authority given for that purpose by the laws of the state of Minnesota, and in compliance with a resolution of the board of supervisors of said town."

In the case of the town of Plainview, at or about the time the railroad company had complied on its part with the mutual agreement, one George Harrington, a tax-payer of that town, brought an action in the district court of the state against the town officers and the Plainview Railroad Company, to restrain the town officers from executing and delivering the bonds as stipulated, for the alleged reason that the act under which they were issued — sec. 7, ch. 106, Laws of Minnesota for 1877, which provides for arriving at a mutual agreement between the railroad company and the town by proposition and petition of a majority of the resident tax-payers — was unconstitutional and void. A temporary injunction was issued to restrain the execution and delivery of the bonds. The cause was tried January 27, 1879, upon stipulated facts, and among other things it was admitted at the trial, "That relying on and induced and influenced by the proceedings set out, and particularly by the resolution of the board of supervisors, the Plainview Railroad Company constructed and had, before the commencement of that action, its line of road constructed, and has had the same graded, and the ties and iron laid thereon, with the cars running thereon from a point of junction with the Winona & St. Peter Railroad, in the county of Olmstead, east of the west line of Eyota, in said county, to a point within the corporate limits of the village of Plainview, as the same existed December 31, 1877, and had in all

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respects complied with the terms and conditions specified in the proposition by it to be performed.”

The district court held the act valid, and found for the defendants.. A motion for a new trial made by plaintiff was denied March 11, 1879, and he appealed from such denial to the supreme court of Minnesota on the next day. Three days afterward judgment was entered by the district court dissolving the injunction and dismissing the action, and on the next day the town issued the bonds in question. On the sixth of October, 1880, the supreme court of Minnesota having heard the appeal, decided that the act under which the bonds were issued (ch. 106, sec. 7, Laws 1877) was unconstitutional and void.

S. U. Pinney and Thos. Wilson, for plaintiffs

Gordon E. Cole and Robt. Taylor, for defendants.

NELSON, *District Judge*.— These cases are tried together without a jury. The only matters relied on in defense are:

First. That the provisions of ch. 106, General Laws of Minnesota of 1877, and particularly of sec. 7, under which the bonds and coupons issued, were unconstitutional and void.

Second. That the decision of the supreme court of Minnesota in the case of *Harrington v. The Plainview Railroad Company*, is conclusive and binding in respect to the first point, upon the federal courts, as an exposition and construction of the constitution of the state of Minnesota.

The views taken by the court will render it necessary to consider only the second defense urged. The following propositions must control the decision:

First. The recitals in the bonds are conclusive evidence in favor of the plaintiffs, who purchased without other information than that which appears upon their face, that all the conditions precedent prescribed in the law had been complied with.

Second. If the law under which the bonds issued had

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been sustained and recognized as valid by the highest court of the state at the time, no subsequent act of the judiciary can impair their validity in the hands of the plaintiffs.

The bonds on their face refer to the law under which power to issue them was given by the legislature, and the coupons, though detached, are described with sufficient certainty in the complaint, and the evidence is plain that they belonged to the bonds issued. If the bonds are valid obligations, the coupons are identified and follow the bonds, so that if the second proposition can be applied, the plaintiffs are entitled to recover.

In *State ex rel. v. Town of Highland*, 25 Minn. 355, a case arose under the act of 1877, and sec. 7 was before the supreme court of the state. Proceedings for a *mandamus* to compel the town of Highland to comply with the mutual agreement entered into as prescribed by this section, were instituted, and on motion to quash the alternative writ which had issued, the respondent's counsel presented and urged in a written brief, among other things, the following, as appears by the records on file, but not given in the report of the case, viz.:

“*Fourth.* Because the act of 1877, ch. 106, in so far as it attempts to empower a majority of the tax-payers of a town by means of a petition to enter into and bind the town by agreement, is unconstitutional and void.”

The court, in its decision, after citing the principal provisions of the act, say, “We think the following propositions clearly deducible:

“*First.* The statute authorizes a town to aid the construction of railroads. It does not authorize aid to roads already constructed. The idea of the law-maker unquestionably was, to authorize aid to be given to roads which were believed to require aid to secure their construction, and not to roads which had been constructed without such aid.”

“*Second.* The aid is to be rendered by the making of a mutual agreement between the town and the railroad com-

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pany, by which the town is legally bound to issue its bonds to or for the use of the company, upon performance by the latter of its part of the agreement, and by the issue of bonds accordingly."

"*Third.* Until the mutual agreement is arrived at and perfected, as provided in sec. 7, no legal liability or obligation whatever is imposed upon or incurred by the town in the premises. In other words, unless an agreement is arrived at and perfected as there provided, all steps which may have been taken with the intent of arriving at and perfecting one, or looking in that direction, are absolute nullities."

Here was a recognition, in my opinion, of the validity of this law, and a full and comprehensive construction of the section. It is true the court did not consider the constitutional question, but the decision did not express a doubt, and at least favored its validity. This decision was rendered January 10, 1879, and at that time the bonds with the coupons in suit, of the town of Elgin, had been issued and were in the market as commercial securities. The Plainview Railroad Company has also entered into an agreement with the town of Plainview, and by the construction of its road was entitled to receive town bonds, when a suit was commenced in the district court of the state, by a tax-payer and citizen of the town, entitled *Harrington v. Town of Plainview et al.*, to enjoin and restrain their issue, and a preliminary injunction issued. This suit was subsequently tried and the action was dismissed by the court and the injunction dissolved, and the town issued its bonds. An appeal to the supreme court of the state was taken by Harrington, and among other things it was argued on the hearing that sec. 7 of the act was unconstitutional, and it was so declared by the court. It is insisted that this decision of the highest court of the state is binding, and the defendants entitled to judgment. Such is not my opinion. The federal courts, it is true, generally follow the adjudication of the highest courts of the state in the construction of its statutes, but exceptions are recognized,

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and these cases fall within the rule laid down in *The City v. Lamson*, 9 Wall. 477, which is, briefly, where a decision of the highest judicial tribunal at the time the bonds issued favors the validity of the law under which they issued, a subsequent decision impairing their validity will not be followed to the prejudice of *bona fide* holders. To the same effect is *Douglas v. Pike County*, 101 U. S. 687. "We have no hesitation in saying that the rights of the parties are to be determined according to the law as it was judicially construed to be when the bonds were put on the market as commercial paper." See collated authorities in Dillon on Municipal Corporations.

The question as stated by the court in that case is not so much whether the last decision was right, as whether it should be followed.

These bonds having been purchased by the plaintiffs before the decision in the Harrington case, and no previous expression by the court other than that contained in *State v. Town of Highland*, are "clean obligations to pay" not affected by the last decision of the court.

It is urged that the bonds are invalid in the plaintiff's hands by the fact that they were purchased during the pendency of the suit in which the law was held to be unconstitutional. The answer to this proposition is, that the plaintiffs were not parties to, and had no knowledge of that suit, and the rule that all persons are bound to take notice of a pending suit does not apply to negotiable securities. 97 U. S. 96.

The plaintiffs are entitled to judgment in each case, and it is so ordered.

McCRARY, *Circuit Judge*.—I concur in the conclusions reached in the foregoing opinion, as well as in the reasons by which they are supported.

Johnstone v. Robinson.

JOHNSTONE v. ROBINSON *et al.*

(*District of Colorado. October, 1881.*)

1. PROSPECTING FOR MINES — "GRUB STAKE" — ARRANGEMENT MUST EXIST AT THE TIME OF DISCOVERY TO GIVE JOINT INTEREST.— The partnership association, or association between parties who may be engaged in prosecuting explorations in the public lands for mines, must exist at the time of the location and discovery in order to give the parties, other than the discoverer, an interest in the property.
2. SAME — ABANDONMENT OF CONTRACT.— A. made an agreement with B., by which the latter was to take care of the former for the winter, and furnish outfit in the spring, when A. should go prospecting on their joint account. B., at least partially, complied with the agreement by keeping A. for the winter and furnishing some money in the spring. But before making any discovery or search for mines under this arrangement, A. made a new arrangement with R., by which the latter furnished the "outfit," and the former did the prospecting; under this last arrangement the mines were discovered. *Held*, that the making of the arrangement with R. was an abandonment of the agreement with B., and the latter cannot share in the interests of A. in the property discovered and located under the new arrangement.

Wells, Smith & Macon, for plaintiffs.

G. G. Symes, for defendants.

HALLETT, *District Judge (orally)*.— Sarah E. Johnstone, a married woman, and Mary A. and Ellen W., her infant children, filed a bill in the district court of Arapahoe county against the unknown heirs of Charles Jones, to compel the conveyance of certain interests in mining property in the county of Summit. Afterwards George B. Robinson and the Robinson Consolidated Mining Company, who had acquired Jones' interest in the property, were made parties to the suit. On the death of Robinson, his heirs, and perhaps his personal representatives, were substituted for him as defendants, and the bill is now pending against those parties.

The theory of the case, as advanced in the bill, is that Mr. Jones, having been engaged with Mrs. Johnstone's husband

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in the San Juan country, in the year 1877, in prospecting for mines, agreed with Mrs. Johnstone that if he should be brought out to Denver by her or her husband, and kept here during the ensuing winter, and furnished with an outfit for prospecting in the spring, that he would give to her and her children one-half the property which he should acquire during the summer, or that they should be interested with him in some partnership relation to the extent of one-half of what he should acquire during the summer.

It is alleged in the amended bill that all these things were done; that is to say, that Jones was brought to Denver and kept during the winter, and furnished with the necessary outfit in the spring, and in the course of the summer that he acquired the property in which the plaintiffs claim to have an interest, and which they wish to have decreed to them in this suit.

There is some evidence to show that Jones was brought to Denver pursuant to the agreement, and kept here during the winter by Mr. Johnstone. It may be assumed that the fact is proved; and as to furnishing him with an outfit in the spring, there is testimony that some money was given to him at the time when he was about to start to Leadville, the amount of which is not shown; also some blankets and perhaps some clothing. It is not claimed that anything more was furnished him — provisions, or tools, or animals, if any were necessary. As to that matter, then, it may be said that the proof is not full, does not establish a compliance by the plaintiff, Mrs. Johnstone, or her husband, with the agreement.

Jones went on to Leadville, and there, after something of a spree, and idling around for some time, and making similar arrangements as to prospecting with at least two other parties, he went out in the interest of Mr. Robinson, or parties who were associated with Robinson, he himself being one of them, in an effort to discover mines. The mines in

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controversy here were discovered sometime during the summer, Jones having in the discovery, by the terms of the agreement with Robinson and others, an interest of one-fourth, or something like that, in the locations so made.

It is to secure one-half of that interest so acquired by Jones under an agreement with these other parties, not with the plaintiffs in this suit or any of them, but with other parties, that this suit is prosecuted. Jones died in the autumn of that year, and the bill was brought against his unknown heirs, these other parties becoming defendants afterwards.

Upon this statement of facts, I deem it only necessary to say that, in my view, the partnership relation—or if it be not called a partnership relation, but by some other name—the association between parties who may be engaged in prosecuting explorations in the public lands for mines, must exist at the time of the alleged discovery and location, in order to give to the parties associated an interest in the property. If it does not then exist, so that the person acting in the field, making the discovery and the location, can be said to be acting for the others as well as himself, no interest can be acquired by those who are not personally present. Complainants' counsel seem to have felt the force of that rule, and they sought to establish the existence of this relation by Jones' admissions made by him at different times through the year, to the effect that he expected to give some interest to Mrs. Johnstone and her children, or that they held some interest as discoverers. But that, I think, is not sufficient. Conceding that such admissions may have been made, and I think the evidence establishes that they were made, that is not sufficient to overcome the strong circumstances of the case. Mr. Jones had agreed with other parties, whose names I do not now recall, to go upon a prospecting expedition for them, or to allow them to stand in interest with him. He was a man of dissipation, and, as shown by the evidence here, in the habit of drinking about all the time when he

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could find anything to drink that would produce drunkenness, and for that reason I should say that not very much importance is to be attached to his statements.

But if we should give the greatest weight to them, the weight that would be attached to the declarations of a sober man, of deliberate ways and habits of mind, I doubt whether it could be said that one having made one arrangement or agreement with certain parties to act with them in securing mines, and afterward making another agreement with other parties, and going apparently in pursuance of the last agreement, with the means furnished by his latest associates, could be said to be acting under and in pursuance to the first agreement. I do not believe that inference would be a fair one. If several persons associate themselves together by agreement to go out and discover mines, and some of them furnish the means of prosecuting the enterprise, as provisions and tools, and the like, and others go out and contribute their labor, and each party performs his part of the agreement according to its terms, it is clear enough from the conduct of the parties, as well as their declarations, that they are acting in fulfillment of their contract and agreement, whatever it may be; but when this agreement is apparently abandoned, and some new arrangement is made between new parties, and means are furnished by some of them as arranged in the first instance, and others go out in the prosecution of the joint enterprise, anyone would say, upon that circumstance alone, that they are acting under and in pursuance to the last agreement, and not the first. And that is the situation of affairs here. I do not think that it is open to discussion, even, that Mr. Jones, at the time he made these discoveries, was acting under his arrangement with Mrs. Johnstone. He had abandoned that, as he abandoned everything else, apparently, within a day or two after it was made, and taken up with this new idea, with the people who came to him last, and furnished the necessary articles for prosecuting his enterprise. His acquisitions during this time,

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as he got only a small interest in the property, must be taken to have been made for himself, and these plaintiffs were not interested in them at all; and whatever remedy they would have against him or his representatives for his breach of contract, they would have no right whatever to the property which he might acquire when acting under this new arrangement, this new agreement with Robinson and his associates.

That is the strong reason in my mind which will enforce a decree for the defendants in this case.

The bill will be dismissed, and the defendants will recover

STRETTELL v. BALLOU *et al.*

(*District of Colorado. October, 1881.*)

1. EQUITY JURISDICTION OF FEDERAL COURTS.—The equity jurisdiction of the circuit courts of the United States is derived from and defined by the constitution and laws of the United States, is the same in all the states, and is not affected or varied by the statutes of the states regulating and defining the chancery powers and jurisdiction of the state courts.
2. PARTITION OF MINING CLAIM—A MERE POSSESSORY INTEREST.—The holder of a mere possessory interest in land, not having title thereto, cannot maintain a bill for partition in the circuit courts of the United States. Such a bill must be filed by one having title to a portion of the premises sought to be partitioned. If a statute of the state authorizes such bill it must be filed in the state courts.

This is a bill in equity in which the complainant prays partition of certain placer mining property in which he has, as he alleges, an undivided interest. It appears from the allegations of the bill and the proof that the title to the property in controversy is in the United States, the parties to this suit having jointly a possessory claim or interest, with the right to take ore therefrom, but no other title. The defense is that this court has no jurisdiction in equity because the complainant has no title to the land.

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M. B. Carpenter, for complainant.

Dixon & Reed, for respondents.

McCARY, *Circuit Judge*.—It has long been settled that the jurisdiction of the circuit courts of the United States in equity is derived from and defined by the constitution and laws of the United States; that it is the same in all the states, and is not to be affected or varied by the various statutes of the states whereby the chancery powers and jurisdiction of state courts may be defined and regulated. This court cannot therefore look to any state legislation as the source of its jurisdiction in equity. In *Boyle v. Zacharie*, 6 Peters, 658, Chief Justice Marshall, speaking for the supreme court, thus stated the rule: "And the settled doctrine of this court is that the remedies in equity are to be administered not according to the state practice, but according to the practice of courts of equity in the parent country, as contradistinguished from that of courts of law, subject, of course, to the provisions of the acts of congress and to such alterations and rules as in the exercise of the powers delegated in those acts the courts of the United States may from time to time prescribe." And see, to the same effect, *Robinson v. Campbell*, 3 Wheat. 212; *United States v. Howland*, 4 Wheat. 115; *Neves v. Scott*, 13 How. 271; *Noonan v. Lee*, 2 Black. 499; *Johnson v. Roe*, 1 McCrary, 162. It follows from these authorities that, unless the jurisdiction of this court can be derived from the constitution and laws of the United States alone, it does not exist.

Sec. 913 of the Revised Statutes of the United States declares that the modes of proceeding in equity causes shall be according to the principles, rules and usages which belong to courts of equity, as contradistinguished from courts of law; and this language refers to the principles, rules and usages by which the high court of chancery of England was governed at the time the judiciary act was passed.

It is very clear that according to the general principles of

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equity jurisprudence as administered in England at the time of the passage of the judiciary act, and as administered by courts of chancery in this country, except where a different rule is adopted by statute, the holder of a mere possessory interest in land, and not having title thereto, cannot maintain a bill for partition. Such a bill must be filed by one having title to a portion of the premises sought to be partitioned. *Horncastle v. Charlesworth*, 11 Sim. Ch. 314; *Williams v. Wiggand*, 53 Ill. 233; *Ross v. Cobb*, 48 Ill. 111.

It is not claimed that there is any act of congress conferring upon this court jurisdiction in equity of a bill for partition brought by the owner of an undivided interest in a mining claim where the legal title to the real estate remains in the United States. It follows that this bill must be dismissed for want of jurisdiction. If the statutes of the state of Colorado, relied upon by counsel for complainant, confer jurisdiction upon the courts of the state in a case of this character, the complainant must resort to those courts.

SIMMONS v. SPENCER *et al.*

(*District of Colorado.*)

1. ACTION FOR MONEY HAD AND RECEIVED — WHEN IT MAY BE JOINT.— In order to maintain an action for money had and received, it must appear that the money was jointly received by all the defendants; upon this the law may imply a promise on the part of all to pay to the rightful owner. If A. receive money to the use of B., and turn it over to C., B. cannot maintain a joint action against A. and C. for money had and received to the use of himself, for the reason that they did not jointly receive the money—although this form of action might be maintained against either A. or C. separately.
2. TROVER—JOINT ACTION IN.—To maintain a joint action in trover, it must appear that the specific money, or thing sued for, came into the hands of the defendants successively.

Ruling on demurrer

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S. P. Rose, for plaintiff.

H. B. Johnson, for defendants.

HALLETT, District Judge (orally).—The first and second counts of the complaint set forth, in substance, a sale of certain property, which the plaintiff alleges belonged to him, and conveyances from the plaintiff to McCartney, and from McCartney to the defendant Spencer, which conveyances were deposited with the Merchants and Mechanics' Bank of Leadville, to be delivered upon payment of a sum of money amounting to \$20,000, for the use of the plaintiff. By instructions given upon the leaving of the deeds with the bank, the money was to be deposited to the credit of the plaintiff in this suit; plaintiff received \$7,000 of this sum, and \$13,000 which was afterwards paid by the purchaser, whoever he may be, was not by the bank placed to the credit of the plaintiff, but was, in fact, turned over to the defendant Spencer. And upon this state of facts it is claimed that a liability has arisen upon the part of all the defendants to pay the plaintiff this sum of \$13,000. .

The structure of these two counts is for money due upon a contract; for money had and received by the defendants to the plaintiff's use. Nothing is said about any conversion of the money by the defendants to their own use, and there is nothing in the counts to indicate that they are based upon the theory that a tort was committed by the defendants in receiving this money and appropriating it in the way in which, it is alleged, they disposed of it.

In order to maintain an action as for money had and received, it must appear that the money was *jointly* received by all the defendants, and upon that the law may imply a promise on the part of all to pay it to the rightful owner; and although, upon the facts stated here, there may be a liability in that form of action against Spencer alone, or against the parties constituting the Merchants and Mechanics' Bank

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of Leadville alone, there cannot be a joint liability on the part of all these persons in that form of action, because they did not jointly receive this sum of money. The allegation is, in these counts, that the money was received by the Merchants and Mechanics' Bank of Leadville, and by it wrongfully and fraudulently turned over to the defendant Spencer. That may make a liability as for money had and received on the part of these parties severally,—that is, upon the part of the persons constituting the bank, and upon the part of Spencer, severally; but it cannot be a liability arising by contract on the part of all of them, because they did not jointly and collectively receive this money.

As to whether the action may be maintained against them jointly as for a tort, in substance, as an action of trover, there is some doubt. It is laid down in the case of *Orton v. Butler*, 5 B. & A. 652, that on a money demand, merely to allege that the defendant received money and afterwards converted it to his own use, which is the form of declaration in an action of trover, the action cannot be maintained, because, they say, to allow that, would be to defeat the defendant's right to set-off; and that the action of trover can only be maintained where the specific thing for which suit is brought can be identified, and that it must be possible in such case, where an action of trover is brought, for the defendant to relieve himself from all liability by tendering the property for which the action is brought to the plaintiff; as, for instance, when it is brought for a horse, he may surrender the horse, and relieve himself from liability.

The same view is taken in several cases in Croke's Elizabeth; and there are cases—one in 4th E. D. Smith, N. Y. (*Donahue v. Henry*, 162)—which declare, that when a sum of money had been received which belongs to the plaintiff in the suit, and concerning which it is the duty of the defendant to turn over the very sum which he received to the plaintiff, *the very money, the same dollars and the same bills*, if he received it in that form, that then, if he makes any

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other disposition of it, the action of trover may be maintained. In 1 Missouri Reports there is a case in which the plaintiff brought an action in that form against parties who were conducting a lottery, claiming that he had become entitled to a sum of money as the holder of a ticket in the lottery, and that they had wrongfully refused to pay it over to him, and seeking in trover to recover the amount. The court say, in that instance, that if, in fact, any sum of money had been set apart to the plaintiff — \$100, I think, was the amount — if it had been parcelled off by itself by the defendants as his money, and afterwards they had taken those dollars and converted them to their own use, he might bring an action of trover for the dollars so parcelled off, but that he could not, upon the general charge that so much money was due to him, and wrongfully detained by the defendants, maintain that action. His action must, in that case, be in the form of an action on contract, if he would recover at all.

That is the distinction that, I think, is recognized in all of the cases, and applying it to the present case, it may be true that the defendants, the Bank of Leadville, as to the very bills, notes or coin, if it was such, which they received for this property, may be liable in an action of trover or an action founded in tort for the conversion of that money, if it be so alleged in the complaint. And if that money, the very same money, was paid over to Spencer, he also would be liable, and then, and in that case, they both might be joined in one action as tortfeasors. To illustrate, I will read a paragraph from Bliss on Code Pleadings: "Under the code, an action for the recovery of personal property will lie against one who has wrongfully parted with the possession of property, jointly with one in actual possession." And the same principle applies to trover: "Thus one who has wrongfully pledged plate belonging to the plaintiff is liable to an action of detinue, jointly with the person with whom it had been pledged. So, where one has fraudulently obtained a credit upon a bill of goods, and assigned them over

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for the benefit of his creditors, the vendor, having the right to repudiate the sale and pursue the goods, may make both the purchaser and his assignee parties to an action for their possession." For this a case in New York is cited.

The principle declared is, that where a party has the right to a specific thing, and he can pursue that particular thing through several hands, he may charge all of these parties consecutively, or who held the property consecutively, in one action, for its value. So that here, if it be true that the Smiths, or the persons who constitute the Merchants and Mechanics' Bank, received this money, and turned over the same money to Spencer, they may be jointly charged in proper phraseology as for converting that money, but not otherwise. And it must be the identical money.

These cases, and all the authorities that I have been able to find, go to the point that where an action is founded in tort, and maintained upon that principle, it must be for the conversion of the specific thing, and it can only be maintained where the property itself can be traced to the hands of the party to be charged.

In that aspect, if the facts are truly stated in the first and second of these counts, no joint action can be maintained against these parties unless the pleader may be able to allege that the same money came to the defendants — the Merchants and Mechanics' Bank of Leadville, and the defendant Spencer, successively. The plaintiff must allege that it was the same money, and that the defendants converted it to their own use, in order to make it an action for tort.

Upon the other theory, there is no difficulty in maintaining an action against either of the defendants separately as for money had and received, and upon that principle the third count, which states nothing as to the way in which the money came to the hands of the parties, but merely charges that the defendants are liable to the plaintiff for \$18,000, received by them for the use of the plaintiff, is not open to any objection.

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The ruling upon the demurrer, therefore, must be that it is sustained as to the first and second counts, because there the facts are stated which show that the defendants cannot be jointly liable, and overruled as to the third count, because nothing appears in that count to indicate that they may not be jointly liable.

If I have made myself understood, it will be apparent that the plaintiff must amend so as to make this substantially an action of trover for this sum of money against all these parties, or by dismissing his action against one or the other of the defendants. If the action were dismissed as to Spencer, or as to the defendants who constitute the Merchants and Mechanics' Bank of Leadville, I would see no difficulty in maintaining it against the other.

WORLEY v. NORTHWESTERN MASONIC AID ASSOCIATION.

(District of Iowa. January, 1882.)

1. LIFE INSURANCE—POLICY PAYABLE TO DEVISEES CONSTRUED.—

Where the contract between a benevolent aid association and its individual members is for the payment, upon the death of a member, of a sum of money to his devisees, and such member dies intestate, the administrator is not entitled to recover such amount from the association.

The plaintiff, in his petition, states that Phillip H. Worley, deceased, died on or about the twenty-second of October, 1880, intestate, and that the plaintiff is the duly appointed administrator of his estate; that the defendant is a corporation organized and existing under the laws of Illinois; that among the papers of decedent were two policies or certificates issued by the defendant, whereby the defendant agreed and contracted to pay to the devisees of said decedent within thirty days after receiving evidence of said Worley's death, certain sums of money to be arrived at and computed from

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the number of members in the division of which the decedent was constituted a member of said association by such certificate, at a sum certain for each member of the respective class in such division.

The plaintiff avers that he fully performed all covenants and conditions on his part; that satisfactory proofs were made to the company of the death of Phillip H. Worley; that the amount due in the aggregate upon the two certificates is the sum of \$6,299.55, and that the defendant refuses to pay the plaintiff the amount due upon said policies or contracts.

The defendant for answer states that it is not a life insurance company, nor a corporation for pecuniary profit; that it is organized for benevolent purposes solely, under the provisions of the statute of Illinois, approved April 13, 1872, as amended by an act approved March 28, 1874, and providing for the organization of corporations, not for pecuniary profit, by three or more persons making, signing or acknowledging and filing in the office of the secretary of state a certificate stating the name and the title by which said corporation or society or association shall be known in law; the particular business and objects for which it is formed, etc. That the defendant has no capital stock, and that its sole object and purpose, as declared in its certificate, is to procure pecuniary aid to the widows, orphans, heirs and devisees of the deceased members of said association; that by said act under which the defendant was organized it is provided that "associations and societies which are intended to benefit the widows, orphans, heirs and devisees of deceased members thereof, and where no annual dues and premiums are required, and where the members shall receive no money as profit or otherwise, shall not be deemed insurance companies;" the business of insurance not being one for the carrying on of which corporations can, by the terms of said act, be organized; that the defendant is an association such as is described in the act of March 28, 1874, no annual dues or premiums being

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paid, or required to be paid, by its members, and no money or profits paid or contemplated to be paid to them; that the benefits arising from membership in said association accrue solely to the widows, orphans, heirs or devisees directly for their own sole benefit, and are not part of the estate of such deceased member or payable to his administrator; that the benefits arising from the membership of said Phillip H. Worley in said association, as shown by the certificate set forth in the petition, are payable to his devisees and not to other persons; and that said plaintiff, as administrator of the estate of said Phillip H. Worley, is not entitled to receive the same. Defendant avers that it has not knowledge or information sufficient to form a belief whether said Phillip H. Worley died intestate, and submits that the grant of letters of administration on his estate to the plaintiff would not bind the devisees or legatees of the last will of said deceased, if such will should be proved to exist, nor would a payment to plaintiff as administrator protect the defendant from liability to such devisees or legatees, if any such should prove to be.

The defendant exhibits with his answer a copy of the articles of incorporation and by-laws of the association.

The plaintiff demurs to the defendant's answer, and the case is before us upon the demurrer.

E. F. Richman, for the plaintiff.

Putnam & Rogers, for the defendant.

LOVE, *District Judge*.—This action, in both form and substance, proceeds upon a breach of contract. The contract is contained in the certificates, copies of which are exhibited with the petition. The certificates provide that, for certain considerations therein mentioned, flowing from Phillip H. Worley, deceased, the association promises and agrees to pay to the devisees of said decedent certain sums of money therein specified. In order to maintain the action, the

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plaintiff must allege and show a breach of the contract. What breach has the plaintiff assigned? What breach can he assign? He has not alleged that the defendant association has failed, neglected or refused to pay to the devisees of the decedent the sums of money in question. This could not be alleged or shown, because the plaintiff has himself stated that there are no devisees in existence. The breach upon which the plaintiff must rely is the non-payment of the money to him as administrator of the decedent's estate. But is this a breach of the stipulations of the contract? The contract is not that the defendant company shall pay to the decedent in his life-time or to the administrator of his estate at his death. The contract could not have made such a provision, since it would have been utterly repugnant to the whole purpose, scope and design of the association as provided in the very law of its existence. Would a contract by the defendant to pay money to the decedent during his life, or to the administrator of his estate at his death, have been valid under the second article of the incorporation, providing that the business and object of the association is to secure pecuniary aid to the "widows or orphans, heirs and devisees of the deceased members of the association?" In the present case, the contract is, by its express terms, to pay to the devisees. Was it any breach of this contract not to pay to the administrator of the estate? Would it have been a breach to have refused payment to the widow, orphans or heirs of the deceased?

The stipulation entered into by the members of this benevolent or charitable association was to pay money in certain proportions to the devisees of the decedent; that is, to such person or persons as he should appoint by his will to receive the money. It so happens that he died without appointing any beneficiary of his bounty. Is it any breach of the stipulation not to pay to the widow, or the orphans, or the heirs, or to the creditors of the decedent? Neither the decedent nor the defendant corporation intended by this contract

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to provide for the widow, heirs, orphans or creditors of the decedent. The expression of one thing excludes other and different things; the designation of devisees in the contract excludes the other classes—the heirs, widow, orphans and creditors. Who will undertake, without violence to the known meaning of words, to say that the word “devisees” in this contract can be construed to mean, directly or indirectly, the widow, or orphans, or creditors? But if the administrator shall receive the money due upon this contract, it will go through his hands to one, or all, of these classes of beneficiaries.

Indeed, I see no escape from the conclusion that, if the administrator shall collect the money, it must go primarily to the decedent's creditors. The only ground upon which the administrator can enforce payment is that the money belongs as assets to the decedent's estate. He surely cannot collect the money as representative of the widow, orphans, or heirs-at-law, and for their exclusive benefit; since in making a contract for the payment of money to “devisees,” the decedent clearly excluded the other classes for whose benefit alone he could have contracted according to the articles of incorporation. Since then the administrator must, if he collects the money at all, proceed upon the ground that it is assets of the estate, it is clear that the creditors must be first satisfied—a result manifestly inadmissible. No one surely will seriously contend that the creditors of the decedent are entitled to payment out of the fund in question.

Why the decedent did not by will appoint some beneficiary—some devisee—to receive his bounty under the contract in question, we know not. He was himself a Mason and a member of the benevolent association represented by the defendant corporation. He may, in making the contract, have had in contemplation some individual whom he purposed to make the object of his bounty, and he may have changed his mind with respect to the object of his intended bounty. He may have made up his mind that his associates should not be called upon to contribute the sums required to

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fulfill the contract which he had entered into with the corporation. At all events, he died without appointing by will any one to receive the money, and the only presumption we can indulge in is, that he intended not to do what he omitted to perform. Can we presume without proof that he failed to appoint devisees as contemplated by the contract in consequence of carelessness or inadvertence? Is negligence to be presumed?

If B. stipulates with A. upon a consideration flowing from A. to pay money to C., how must A., suing B. upon the contract, assign the breach? Must he not allege the non-payment to C. as the breach of the contract? Would it not be a fatal variance to assign the non-payment to A. as the breach of the contract? And A. dying, must not his administrator, suing at law to enforce the contract, allege the breach to be a non-payment of the money to C.? The contract providing that the money be paid to C., the administrator would certainly fail on the ground of variance, if he assigned as a breach of the contract non-payment to any party other than C. So in the present case the administrator must assign his breach to be the non-payment to the decedent's devisees, as required by the contract. To meet this difficulty the complainant's counsel suggested in the oral argument the analogy between a note payable to the order of the payee and the present case. Suppose the payee should die without making the order appointing the party to whom payment should be made, would his administrator be precluded from maintaining his action upon the instrument? Certainly not; but the difficulty with this argument is that there is no real analogy between the two cases. A note payable to the order of the payee is, to all intents and purposes, in legal effect, payable to the payee himself. The note becoming due, the payee may sue upon it in his own name and recover judgment. He need not assign or indorse it, or in any other way order the note to be paid to any third person. But in the present case it was not the legal effect of the contract that

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the money was payable to the decedent in his life-time. He could have maintained no action at all upon it. What the very contract provided was that the money should, after his death, be paid to such persons as he should by will appoint to receive it. This was its legal effect, as evidenced by its express words; and the question is, can the administrator step in and enforce it contrary to its legal effect? Can he sue upon the contract, alleging it to be payable to any one except the decedent's devisees? And if he should recover the money, can he pay it out in distribution to any one but the devisees of the decedent?

Since the argument of this case at the bar, the question of the right of an administrator to sue in a case like the one now before us has been before the supreme court of Iowa, in the case of *McClure v. Johnson*, 10 N. W. Rep. 217.

In this case the supreme court decided that the money due upon such a policy does not belong to the estate of the decedents as assets; that the only person who has any interest in it, and who can sue for it, is the beneficiary; and that the executor can maintain no action, the estate not being entitled to the money. The court further holds that the code, secs. 2372 and 1182, "contemplates a case where the policy of insurance is payable to the deceased or his legal representative," and not where it is payable to another person for the use and benefit of such person. The court distinguishes this case from *Kelly v. Mann*, id. 211.

In that case, say the court, the money received from the insurance company was assets belonging to the estate, and being such, it was held under the statute that it should be inventoried and disposed of according to law.

Suppose a devisee had been appointed by the decedent, would not payment to him be good? Would not his acquittance be a valid discharge of the obligation to the defendant? And in such case, could the present administrator maintain an action upon the contract to recover the money from the devisee as assets belonging to the estate? This was

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the very point decided in *McClure v. Johnson*. It was there held that such an action could not be maintained, because the money due was not assets belonging to the estate.

And so in the case before us the action cannot prevail, because the administrator has no title to the contracts sued on, either by operation of law or by express terms of the instruments. If he had the legal title to the *chose in action*, and if its proceeds when collected were assets belonging to the estate, he could maintain a suit for the money in whosoever hands found.

Demurrer to answer overruled.

COURTRIGHT v. BURNES.

(*Western District of Missouri, Western Division. November, 1881.*)

1. CHAMPERTY — AS A DEFENSE.— The fact that there is a champertous and illegal contract between plaintiff and his attorney for the prosecution of a cause of action is no ground of defense to the action, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced.
2. CONTRACT — PAROL EVIDENCE.— Parol testimony of a contemporaneous agreement is not admissible to contradict or vary the terms of a written contract.
3. SAME — DEFENSE OF WANT OF CONSIDERATION.— The defense of want of consideration may ordinarily be made at law; but when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court, it is a question for equitable jurisdiction.

Action upon a promissory note for \$7,333, executed by defendant to one F. H. Winston, and by him transferred, after maturity, to the plaintiff.

Besides a general denial the defendant answers as follows:

“For further answer to said petition, says that before and at the time of the making of the pretended note in said petition described, said plaintiff, this defendant, and F. H. Winston

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and George C. Campbell had been and were partners in a contract for building a railroad to a point opposite the city of Atchison, Kansas, from a point on the Chicago & Southwestern Railroad, which road was known as the Atchison branch of the Chicago & Southwestern Railroad. Prior to the date of said pretended note said Winston had been in charge of the construction of said branch road for said partners under said contract, and had received, and then had in his possession, as part of the assets under such contract, forty bonds of the city of Atchison, for the sum of \$1,000 each, belonging to said parties, subject to the payment of the partnership debts, and a distribution among said parties after such payment in proportion to their respective interests therein. Shortly before said pretended note was made, said parties made, constituted, and appointed this defendant as trustee for said partners, to take charge of said partnership business in place of said Winston, and to wind up said business; that at the time of making said pretended notes said partnership had not been settled, nor is it yet settled, nor has the interest of said Winston in said partnership, or in said bonds, been ascertained; that at the time of making said pretended note Winston turned over to this defendant, as trustee of said partnership as aforesaid, said bonds and other assets in his hands belonging to said partnership, with the consent of said partners, and for the benefit of said partnership; that at the time said Winston turned over to defendants said bonds and assets, said Winston estimated that there would be due him as a partner as aforesaid, upon the final settlement of said partnership, a considerable sum of money arising from said bonds or their proceeds, and he estimated that sum at the amount of said pretended note; that there having been no settlement of said business, said Winston and this defendant considered said estimate as a mere conjecture, depending upon the debts due said partnership, and the result of said settlement. Said Winston therefore requested this defendant, as the trustee of said partners, of whom plaintiff was

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one, to make said note with the understanding that the same was not to be sued on, but was to be deemed a mere memorandum of the amount that should be estimated as the share of said Winston on account of said bonds on a settlement among said partners. Defendant executed said pretended note with such understanding between said Winston and himself as trustees of said partnership, and not as the separate note of this defendant. Said pretended note, so executed, was assigned by said Winston for the benefit of plaintiff to one G. W. De Camp, and by said De Camp to plaintiff, without any consideration from said De Camp to Winston, nor from said plaintiff to De Camp, and with full knowledge by said De Camp and plaintiff of said facts relating to said note, and that such were made long after the time at which said note was due, as appeared on its face, and upon the further consideration and agreement between said De Camp and plaintiff and Winston, that this defendant should not be sued upon said note, and this defendant says that said note was and is wholly without consideration, and is null and void, and that said note is based upon and grew out of transactions relating to business of said partners; that said partners are interested in the same, and in consideration that said De Camp shall receive a portion of the amount to be recovered in such suit, to wit, four-tenths of the amount so recovered, which said agreement is illegal, and against public policy and good morals. Defendant, therefore, asks to be discharged with his costs."

This case was tried before the court by agreement of parties, a jury being waived.

Botsford & Williams and G. W. De Camp, for plaintiff.

Willard P. Hall, Silas Woodson, Benj. F. Stringfellow and L. H. Waters, for defendant.

McCRARY, *Circuit Judge*.—The answer alleges that this suit is being prosecuted by one of the attorneys for plaintiff upon a champertous contract by which he is to pay the ex-

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penses of the litigation and receive as his compensation forty per cent. of the sum realized; and the defendant moves to dismiss the suit for that reason. The proof sustains the allegation of champerty, the testimony of the defendant himself being quite conclusive upon that point. This makes it necessary for the court to decide the important question whether the plaintiff can be defeated in his action upon the note by proof that he has made a champertous contract with his attorney. In other words, can the defendant, the maker of a promissory note, avoid payment thereof or prevent a recovery thereon, by showing that the holder of the note has made a void and unlawful agreement with an attorney for the prosecution of a suit upon it.

The authorities upon this question are in conflict. Some courts have ruled that if the fact that a suit is being prosecuted upon a champertous contract comes to the knowledge of the court in any proper manner, it should refuse longer to entertain the proceeding. *Barker v. Barker*, 14 Wis. 142; *Webb v. Armstrong*, 5 Humph. 379; *Morrison v. Deaderick*, 10 Humph. 342; *Greenman v. Cohee*, 61 Ind. 201.

Other courts have held that the fact that there is an illegal and champertous contract for the prosecution of a cause of action is no ground of defense thereto, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced. *Hilton v. Woods*, L. R. 4 Eq. Cas. 432; *Elborough v. Ayres*, L. R. 10 Eq. Cas. 367; *Whitney v. Kirtland*, 27 N. J. Eq. 333; *Robinson v. Beall*, 26 Ga. 17; *Allison v. Railroad Co.* 42 Iowa, 274; *Small v. Railroad Co.* 8 N. W. Rep. 437.

This latter view is in my judgment supported by the better reason. It is not necessary for the full protection of the client to go so far as to dismiss the suit, for he is in no manner bound by the champertous agreement; nor are there any reasons founded on public policy that should require such dismissal. If all champertous agreements shall be held void, and the courts firmly refuse to enforce them, they will

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thereby be discouraged and discountenanced to the same extent and in the same manner as are all other unlawful, fraudulent, or void contracts. If, on the other hand, the defendant in an action upon a valid and binding contract may avoid liability or prevent a recovery by proving a champertous agreement for the prosecution of the suit between the plaintiff and his attorney, an effect would thus be given to the champertous agreement reaching very far beyond that which attaches to any other illegal contract. The defendant in such case is no party to the champerty; he is not interested in it, nor in anywise injured by it. If the contract upon which he is sued is a *bona fide* contract, upon which a sum of money is due from him to the plaintiff, and he has no defense upon that contract, I can see no good reason for holding that he may be released by showing that the plaintiff has made a void and unlawful agreement with his attorney concerning the fees and expenses of the suit.

The tendency in the courts of this country is strongly in the direction of relaxing the common-law doctrine concerning champerty and maintenance, so as to permit greater liberty of contracting between attorney and client than was formerly allowed, and this for the reason that the peculiar condition of society which gave rise to the doctrine has in a great measure passed away. In some of the states the common-law rule is altogether repudiated, and it is held that no such contract is now invalid unless it contravenes some existing statute of the state. *Sedgwick v. Stanton*, 14 N. Y. 289; *Voorhees v. Darr*, 51 Barb. 580; *Richardson v. Rowland*, 40 Conn. 572; *Mathewson v. Fitch*, 22 Cal. 86; *Hoffman v. Vallejo*, 45 Cal. 564; *Lytle v. State*, 17 Ark. 609.

The common-law doctrine, however, prevails in Missouri, according to the decision of the supreme court of the state in *Duke v. Harper*, 66 Mo. 55. While following that ruling, I am disposed, in view of the general tendency of American courts, to relax somewhat the rigor of the English rule, to apply it only to the champertous contract itself, and not to

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allow debtors to make use of it to avoid the payment of their honest obligations.

It follows that the defense of champerty in this case cannot be maintained, and that the motion to dismiss must be overruled.

This brings us to the consideration of the case upon its merits. The first defense, as set forth in the answer, is, in substance, that the note sued on was not intended to bind the defendant to pay the sum therein named thirty days after date, as appears from its face, but was intended as a mere memorandum to show that Winston, the payee, claimed an interest amounting to \$7,333 in certain bonds, turned over by him to defendant, and for which defendant was to account to him in the settlement of certain partnership affairs. In other words, it is claimed that the note sued on was not intended to be a promissory note, and was not to be sued upon or paid as such, but was to be held by the payee as a memorandum, not of any fact or agreement stated therein, but of an understanding wholly inconsistent with and repugnant to its terms. The note is in the usual form of a negotiable promissory note. The alleged understanding or agreement relied upon by defendant is not in writing, and the proof of it, so far as there is any proof, is in the parol testimony of the defendant. The testimony of Winston, the other party, is directly in conflict with that of the defendant, and if it were necessary to decide the question of fact, I should feel bound to say that Winston's statements, corroborated and confirmed as they are by the writing itself, made at the very time of the contract, and, presumably, embodying the understanding of the parties, would prevail over the testimony of the defendant. But it is not necessary to decide this question, because it is perfectly clear that all parol testimony to show a contemporaneous agreement in conflict with the plain terms of the note must be rejected. The rule which excludes such testimony is fundamental and ele-

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mentary, and its application to this defense is too apparent to require argument or the citation of authorities. The contract signed by the defendant plainly declares that he is for value received to pay a given sum of money within a definite time, and to admit parol proof to show the fact relied upon by the defense would not only vary the terms of the instrument, but would flatly contradict and nullify every material provision it contains.

The evidence was, however, received, and may, perhaps, be considered as tending to support the other defense set up in the answer, which is that the note was without consideration. To establish this defense the defendant has attempted to prove—*First*, that the note was given to represent the interest of Winston in certain bonds which belonged to a partnership of which plaintiff and defendant, as well as Winston, were members, and which were at the date of the note turned over by Winston to the defendant; and *second*, that said Winston had, in fact, no interest in said bonds, because he had previously drawn from the partnership assets more than he would be entitled to upon a settlement of the partnership affairs. Ordinarily the defense of want of consideration may be made at law, but is such the case when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court? Even if this were an open question, I should not hesitate to hold that the defendant must resort to a court of equity for relief. But it is not an open question. It seems that defendant, acting upon the theory that his remedy was in equity, filed his bill in chancery in this court setting forth substantially the facts found in his answer in this case, and praying an injunction to restrain the plaintiff from prosecuting this action at law. The bill was demurred to, and the application for the injunction was resisted in this court at the last term.

Upon full argument it was held by this court, that the de-

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fense to the note upon the facts stated in the bill should be made in equity. Mr. Justice Miller, in delivering the opinion of the court, said: "As to the general fact that equity has jurisdiction of the case, and that the transactions ought to be settled in equity without going to law, we have no question." And again: "The whole question can and ought to be settled in a court of equity, and we have no hesitation in overruling the demurrer as a general demurrer." Notwithstanding this decision the defendant saw fit to dismiss his bill in chancery, and to make his defense at law in this case. I must hold that want of consideration for the note, if it can be shown at all, can only be shown on a settlement of the partnership affairs between Burnes, Courtright, Winston, and others, who were interested in the contract for the construction of the railroad named in the answer, and that a court of law is not competent to supervise such settlement. It is argued that the evidence before the court in this case shows that upon such a settlement it would appear that Winston had no interest in the bonds for which the note was given. But I cannot assume that the other members of the partnership, who are not here, would not be able, if brought into a court of equity, to make other and further proof. I cannot take it for granted that Winston would be unable to show that he had an interest in said bonds if the opportunity was afforded him. I have, in considering the defense of want of consideration, assumed that the note sued on was given by defendant for the interest of Winston in the bonds above named, and was to be settled upon a settlement of the partnership affairs, and not to be a charge against the defendant personally. But whether this assumption is in accordance with the facts I do not decide. The testimony upon the question is quite conflicting, and it is not necessary to decide it, because, in any view of the case, the plaintiff has a right to recover at law upon the note, whether it was executed to Winston to hold in trust for others, or for his own use and benefit. *Sturges v. Swift*,

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32 Miss. 239; *Anderson v. Robertson*, id. 241; *Gibson v. Moore*, 6 N. H. 547.

Judgment for plaintiff for the amount of the note and interest.

NOTE.—§ 1. GENERAL STATE OF THE LAW CONCERNING CHAMPERTY IN THE UNITED STATES.—In the foregoing opinion the learned judge aptly draws attention to the fact that the common-law rules with regard to champerty and maintenance have been greatly relaxed in many of the American states, and in others repudiated altogether. Confining our attention to the subject of champerty, which is a species of unlawful maintenance, we shall find that the common-law rules and the early English statutes relating to this offense are not in force in Arkansas (*Lytle v. State*, 17 Ark. 608, 670), California (*Mathewson v. Fitch*, 22 Cal. 86, 94; *Hoffman v. Vallejo*, 45 Cal. 564; *Ballard v. Carr*, 48 Cal. 74; *Howard v. Throckmorton*, id. 483; *Mahoney v. Bergin*, 41 Cal. 423), Connecticut (see *Richardson v. Rowland*, 40 Conn. 565, 572; *Stoddard v. Mix*, 14 Conn. 24), Delaware (*Bayard v. McLane*, 3 Harr. (Del.) 139, 216), New Jersey (*Schomp v. Schenck*, 40 N. J. L. 195), Texas (*Bentinck v. Franklin*, 38 Tex. 458; *White v. Gay*, 1 Tex. 384; *McMullen v. Guest*, 6 Tex. 275; *Carder v. McDermott*, 12 Tex. 553. See *Clark v. Koehler*, 32 Tex. 684; *Hill v. Cunningham*, 25 Tex. 25), and, it seems, Vermont (*Danforth v. Streeter*, 28 Vt. 490; *Edwards v. Parkhurst*, 21 Vt. 472. But compare *Stacy v. Bostwick*, 48 Vt. 192). On the other hand, these rules are held to be in force in Alabama (*Jenkins v. Bradford*, 59 Ala. 400; *Holloway v. Lowe*, 7 Porter, 488; *Dumas v. Smith*, 17 Ala. 305; *Byrd v. Odem*, 9 Ala. 755; *Wheeler v. Pounds*, 24 Ala. 472. Compare *Walker v. Cuthbert*, 10 Ala. 213, 219), Georgia (Ga. Code, 1873, § 2750; *Meeks v. Dewberry*, 57 Ga. 263. Compare *Stansell v. Lindsay*, 50 Ga. 360; *Robison v. Beall*, 26 Ga. 17), Illinois (*Thompson v. Reynolds*, 73 Ill. 11, explaining *Newkirk v. Cone*, 18 Ill. 449. Compare *Fettrow v. Merriwether*, 53 Ill. 275, 279; *Gilbert v. Holmes*, 64 Ill. 548; *Walsh v. Shumway*, 65 Ill. 471), Indiana (*Scobey v. Ross*, 13 Ind. 117; *Quigley v. Thompson*, 53 Ind. 317. See, as to deeds of land adversely held, *Fite v. Doe*, 1 Blackf. 127; *Martin v. Pace*, 6 Blackf. 99; *Galbreath v. Doe*, 8 Blackf. 366; *Leslie v. Slusher*, 15 Ind. 166; *German Mutual Ins. Co. v. Grim*, 33 Ind. 249, 257), Iowa (*Boardman v. Thompson*, 25 Iowa, 467, overruling *Wright v. Meek*, 3 G. Greene, 472; *Adye v. Hanna*, 47 Iowa, 264; S. C. 29 Am. 484. See *Cooley v. Osborne*, 50 Iowa, 526), Kentucky (By statute. See *Rust v. Larue*, 4 Litt. 411, 417; *Davis v. Sharron*, 15 B. Mon. 64, 68; *Harman v. Brewster*, 7 Bush, 355), Massachusetts (*Thurston v. Percival*, 1 Pick. 415; *Lathrop v. Amherst Bank*, 9 Met. 489. As to deeds of land adversely held, *Sweet v. Poor*, 11 Mass. 549; *Brinley v. Whiting*, 5 Pick. 348), Missouri (*Duke v. Harper*, 66 Mo. 51,

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reversing S. C. 2 Mo. App. 1), Ohio (*Key v. Vattier*, 1 Ohio, 59. Compare *Spencer v. King*, 5 Ohio, 182), Rhode Island (*Martin v. Clarke*, 8 R. I. 389; *Orr v. Tanner*, 12 R. I. 94), Tennessee (By statute. *Floyd v. Goodwin*, 8 Yerg. 484; *Weedon v. Wallace*, Meigs, 286; *Webb v. Armstrong*, 5 Humph. 379; *Morrison v. Deaderick*, 10 Humph. 342; *Hunt v. Lyle*, 8 Yerg. 142; *Cross v. Bloomer*, 6 Bax. 74), and Wisconsin (*Barker v. Barker*, 14 Wis. 131; *Miller v. Larson*, 19 Wis. 463; *Martin v. Vedder*, 20 Wis. 466; *Stearns v. Felker*, 28 Wis. 594; *Allard v. Lamirande*, 29 Wis. 502). In New York the subject is covered by elaborate and carefully drawn statutes. See the "New York Code of Remedial Justice." This code is chapter 448 of the Session Laws of 1876. Attention is directed to sections 73, 74, 75, 76 and 77. See, also, the "Penal Code of New York," chapter 676, Session Laws, 1881, §§ 130-142, inclusive. These statutes have been generally held to be a complete substitute for the early British statutes, and the rules of the common law upon the subject of maintenance and champerty. *Sedgwick v. Stanton*, 14 N. Y. 289; *Mott v. Small*, 22 Wend. 425; *Hoyt v. Thompson*, 5 N. Y. 347, per Paige, J.; *Ogden v. Des Arts*, 4 Duer, 275, 283, per Oakley, C. J.; *Richardson v. Rowland*, 40 Conn. 565, construing the New York law. The ordinary species of champerty, which consists in an attorney supporting his client's suit at his own expense, upon an agreement to receive for his compensation a part of the money or thing recovered in the event of success, and nothing in the event of failure, is not within these statutes, and is not unlawful in that state. *Sedgwick v. Stanton*, 14 N. Y. 289; *Rooney v. Second Av. R. Co.* 18 N. Y. 368; *Ely v. Cooke*, 28 N. Y. 365; *Benedict v. Stewart*, 23 Barb. 420; *Coughlin v. New York, etc. R. Co.* 8 Hun, 136; *Richardson v. Rowland*, 40 Conn. 465. Compare *Dawley v. Brown*, 79 N. Y. 390, reversing S. C. 9 Hun, 461. It has been held by the supreme court of the District of Columbia that the common-law rule as to champerty, as relaxed by the modern decisions, is in force in that district. *Stanton v. Haskins*, 1 McArthur, 558.

§2. DISAGREEMENT AMONG THE COURTS AS TO WHAT CHAMPERTY IS. One of the most striking commentaries upon the subject of champerty is found in the fact that the decisions of the courts, which recognize the common-law rules on the subject as being in force, are at utter variance as to what those rules are. The difference of opinion relates principally to the question whether the gist of the common-law offense of champerty is the unlawful maintenance of another's suit, or the mode in which the maintainer is to receive compensation. According to the former class of cases the gist of the offense consists in the unlawful intermeddling with, and the support of another man's lawsuit, without reference to the manner in which the intermeddler is to be paid for his trouble, or whether he is to be paid at all. The latter decisions do not consider whether the maintainer is an intermeddler, or whether he stands in such a relation to the litigation that he may lawfully support

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the suit; but they look chiefly to the mode in which he is to receive his compensation; and, if he is to get for his pains a part of the land, money, or other thing recovered, it is champerty, and unlawful. Applying these distinctions to the case of contracts between attorney and client, and considering that it is not unlawful for an attorney to render professional assistance to a client, it results that, in the opinion of the courts which hold the former doctrine, in order to constitute champerty, the attorney must not only have an agreement with his client whereby the attorney is to get a part of the money or thing recovered, but the attorney must also support, at his own expense, and take all the risks of, the litigation; while, in the opinion of the latter courts, it is champerty if he merely render his services as attorney upon an agreement to get a part of the money or thing recovered, without advancing any of the expenses of the litigation, or without indemnifying his client against costs and expenses. This difference of opinion would not excite so much attention if it originated in the American decisions; but it will be found that it has its origin in a difference of opinion among the most eminent authorities upon the common law. Lord Coke and Mr. Sergeant Hawkins are authorities for the former view, while those American courts which have adopted the latter view have appealed for support to the texts of Sir William Blackstone and Mr. Chitty. This will appear from the following quotations from these eminent writers: First, it is said by Lord Coke that "to maintain to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit, and this is called *cambi-partia* — champerty." Co. Litt. 868b. So Sergeant Hawkins defines champerty as "the unlawful maintenance of a suit in consideration of some bargain to have part of the thing in dispute, or some profit out of it." 2 Hawk. P. C. 463, § 1 (Curw. ed.). On the other hand, Mr. Chitty says that "champerty is the purchasing a suit or right of action of another person; or, rather, it is a bargain with a plaintiff or defendant to divide the land or other matter between them if they prevail at law, *whereupon the champertee is to carry on the party's suit at his own expense.*" 2 Chit. Cont. (11th Am. ed. 996). And the definition of Mr. Justice Blackstone is substantially the same: "A bargain with a plaintiff, or defendant, *campum partire*, to divide the land or other matter sued for between them, if they prevail at law; *whereupon the champertor is to carry on the party's suit at his own expense.*" 4 Bl. Comm. 135. It is thus seen that both Lord Coke and Mr. Sergeant Hawkins omit from their definitions the element that the champertor (or champertee, as Mr. Chitty has it) is to maintain the party's suit at his own expense.

Contracts between attorney and client by which the former agrees, in consideration of having a part of the money or thing recovered, to support, at his own expense, the litigation of the latter (*Martin v. Clarke*, 8 R. I. 389; *Boardman v. Thompson*, 25 Iowa, 487; *Coleman v.*

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Billings, 89 Ill. 183; *Meeks v. Dewberry*, 57 Ga. 268; *Thompson v. Reynolds*, 73 Ill. 11; *Weakly v. Hall*, 18 Ohio, 167; *Coquillard v. Bearss*, 21 Ind. 479; *Orr v. Tanner*, 12 R. I. 94; *Stevens v. Bagwell*, 15 Ves. 189; *Slade v. Rhodes*, 2 Dev. & Batt. Eq. 24; *Grell v. Levy*, 16 C. B. (N. S.) 73; S. C. 10 Jur. (N. S.) 210; *Thurston v. Percival*, 1 Pick. 415; *Key v. Vattier*, 1 Ohio, 59), or to indemnify the latter against costs and charges (*Adye v. Hanna*, 47 Iowa, 264; S. C. 29 Am. 484. Compare *Harrington v. Long*, 2 Mylne & K. 590; *Knight v. Bowyer*, 2 De Gex & J. 445; *Hunter v. Daniel*, 4 Hare, 420; *Tilton v. Gleed*, 33 Vt. 405; *Knight v. Sawin*, 6 Me. 361), are universally regarded as being within the prohibition of the ancient common law against champerty, and also of the early English statutes, which were merely in affirmance of the common law. But it is where the attorney does not undertake to support the litigation at his own expense, or to indemnify the client against costs and charges, but merely agrees to render the ordinary services of an attorney in consideration of receiving a percentage of the money, or a part of the thing recovered, that the disagreement among the courts arises as to whether the contract is unlawful. In Alabama (*Holloway v. Lowe*, 7 Porter, 488; *Elliott v. McClelland*, 17 Ala. 206) and the District of Columbia (*Stanton v. Haskins*, 1 McArthur, 558), it is held that it is. In Wisconsin (*Ryan v. Martin*, 16 Wis. 57, overruling, it seems, on this point, *Barker v. Barker*, 14 Wis. 131; *Allard v. Lamirande*, 29 Wis. 502), Georgia (*Moses v. Bagley*, 55 Ga. 283), Louisiana (*Martinez v. Succession of Vives*, 32 La. Ann. 805; *Flower v. O'Connor*, 7 La. 207), Missouri (*Duke v. Harper*, 66 Mo. 51), and one of the circuit courts of the United States (*Maybin v. Raymond*, 15 N. B. R. 353, per Woods, J.), it is held that it is not.

§ 3. MERE AGREEMENTS FOR CONTINGENT FEES do not seem to come within any of the ideas of champerty to be found in the books, if we except the decisions in Tennessee, all of which were rendered under a peculiar statute. It is to be implied from the word itself that there can be no champerty without an agreement to divide the fruits of the legal contest, although, of course, there may be unlawful maintenance without such an agreement. Accordingly, it is laid down by the supreme court of the United States that agreements to pay contingent compensation for professional services of a legitimate character, before the courts or departments of the government of the United States, or commissions, appointed under treaties to examine claims, are not in violation of any rule of law or of public policy. *Stanton v. Embrey*, 98 U. S. 548, 556; *Wright v. Tebbitts*, 91 U. S. 252; *Wylie v. Coxe*, 15 How. 415. Carrying out this idea, one court takes a distinction between contracts where the attorney is to have for his compensation a part of the land, money, or other thing recovered, and contracts where he is to have a sum of money equal in value to a specified part of the land, money, or other thing recovered. The former are regarded as

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champertous, the latter are not. *Evans v. Bell*, 6 Dana, 479; *Ramsey v. Trent*, 10 B. Mon. 886; *Wilhite v. Roberts*, 4 Dana, 172.

§ 4. CHAMPERTOUS CONTRACTS BETWEEN PLAINTIFF AND HIS ATTORNEY NO DEFENSE TO AN ACTION. The principal interest in the foregoing decision lies in the ruling that, although a suit may be prosecuted in pursuance of a champertous bargain between a plaintiff and his attorney, it does not lie in the mouth of the defendant to set up that fact for the purpose of avoiding the payment of an honest debt, or escaping a just liability. There is no doubt whatever of the correctness of this ruling. After having given attentive study to all the cases I could find in the books on this subject of champerty and maintenance, I affirm with considerable confidence that there is *but one case* where the contrary principle has been *decided*, and that is the case of *Barker v. Barker*, 14 Wis. 181. This case, and two or three others which may be found, where the same conclusion is intimated though not decided, involve a judicial aberration, which was produced by following a similar rule found in some Tennessee cases, overlooking the fact that those cases, in so deciding, merely gave voice to the mandate of a highly penal statute peculiar to that state, which requires the court, on it appearing that a suit is being prosecuted under a champertous bargain between the plaintiff and his attorney, or other person, to dismiss the suit. Thomp. & Steig. Tenn. St. § 1783. See *Douglass v. Wood*, 1 Swan, 393, 395; *Dowell v. Dowell*, 3 Head, 502. So far as I know, there is no similar statute in England or in any state of the Union. The case of *Greenman v. Cohee*, 61 Ind. 201, which the learned judge cites in the principal case as so holding, does not *decide* any question relating to the subject of champerty. There was, indeed, an attempt to thrust this question into that case; but the court decided nothing upon the point, because it had not been raised by the proper exception in the court below. What is said upon the subject is purely an extrajudicial *dictum*, and it so purports to be. It is noticeable that the court cite, in support of this *dictum*, the Wisconsin case of *Barker v. Barker*, *supra*, and the Tennessee cases cited in that opinion; and the same could be shown with regard to two or three other American cases which contain similar *dicta*. It thus appears that all the cases to be found, where this singular ruling is made, take root in a local statute in Tennessee. In all the courts which have not fallen into this error, the contrary has been ruled wherever the question has been presented, so far as I can find. In a case decided in Massachusetts in 1827 (*Brinley v. Whiting*, 5 Pick. 848), it was said that no precedent could be found showing that maintenance could be pleaded in bar to an action for the recovery of land, though it was also said that no precedent could be found showing that such a plea was bad. In one of the English cases cited in the principal case (*Elborough v. Ayres*, L. R. 10 Eq. 367), it was admitted that, in an action at law, the fact that the plaintiff was being illegally

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assisted would, if pleaded, be no defense. In another English decision (*Hilton v. Woods*, L. R. 4 Eq. 432), cited in the principal case, a suit for the recovery of an interest in land was being prosecuted under a bargain between the plaintiff and his solicitor, which exhibited the worst species of champerty. The plaintiff did not know that he had any title, until a mousing solicitor informed him of it, and agreed to prosecute the suit for recovery, and to indemnify him against costs and expenses, in consideration of receiving an agreed part of the value of the property recovered. This fact was brought out upon a cross-examination of the plaintiff, who testified as a witness in the case. Upon this ground, Sir Richard Malins, V. C., was pressed to dismiss the suit; but he refused to do so, saying that he could find no precedent in the books for such a course. In another modern English case in equity, which was a suit to recover certain annuities, it was held, on like grounds, that it was no defense that some of the annuities had been assigned, pending an action respecting their title, upon a promise to indemnify the vendor against the future costs of the litigation. *Knight v. Bowyer*, 2 De Gex & J. 421, 444. The St. Louis court of appeals has also held, in recent cases, that such a defense cannot be made to an action. *Bent v. Priest*, 10 Mo. App. 543; *Million v. Ohnsorg*, id. 432.

An interesting application of this rule is also found in the case of the selling of a pretended title to land, contrary to the statute of Hen. VIII (St. 32 Hen. VIII, c. 9), and contrary to the common-law rule, of which this statute has been held merely declaratory. Here the rule is, that if A. is sued by B. for the recovery of land, it is no defense for A. to plead and prove that, before the commencement of the suit, B., being out of possession, had made a conveyance of the land to a third party, and that he was prosecuting the present suit in his own name, under an arrangement with such third party, and at the charges and for the benefit of the latter. The reason is that the conveyance to the third party is void, because unlawful. It does not convey a title to the third party which he can assert against the tenant in possession, nor does it divest the title of the grantor. It is a violation of law which may expose the plaintiff to a penalty, but it furnishes no reason why the defendant should keep the plaintiff's land, if the title is really in the plaintiff. Such a plea is merely equivalent to saying this: "It is true that the plaintiff has title, as he declares, but, nevertheless, he ought not to recover possession, because he has attempted to part with his title, and that under circumstances which render his conveyance unlawful, and hence null and void." *Brinley v. Whiting*, 5 Pick. 348, 354; *Williams v. Jackson*, 5 Johns. 500; *Wolcot v. Knight*, 6 Mass. 418, 421; *Redman v. Sanders*, 2 Dana, 68.

The more this subject is looked into, the more the absurdities which attend the contrary view accumulate. For instance, it is said that the plaintiff has parted with his title under an agreement which is void for maintenance; that the plaintiff is a nominal party only; that the action

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is really prosecuted by the plaintiff's grantee in this void deed, using the plaintiff's name, in pursuance of an unlawful bargain between them; and that, if this is allowed to proceed, the effect will be that the law will lend its aid to the parties to an illegal transaction, to consummate and carry into effect what they have agreed to do, contrary to law. These arguments certainly strike the mind with great force; but the best way to judge of them is to consider the result to which they lead, and, at the same time, the result which is reached by taking the contrary view. They lead to the absurd result that the plaintiff, by attempting, contrary to law, to convey his land to a third party, not only does not convey it to such third party, but conveys it to the defendant, to whom he never intended to convey it, and who may be a mere disseisor, without even color of title. This would add a new penalty to an attempt, by a party out of possession, to convey land, and one which is not prescribed by the statute of Hen. VIII, nor by any rule of the common law. But if the contrary view is adopted, it will result that the plaintiff, if he really had the title at the time when he was disseized by the defendant, will recover the land, and he can afterwards make his entry inure to the benefit of his grantee. A rule which thus reaches the very right of the case cannot be opposed to the policy of the law. That the courts have placed their conclusion substantially upon the grounds thus stated, will be seen by the language of Parker, C. J., in *Brinley v. Whiting*, 5 Pick. 348, 358.

So, coming back to the phase of the question we are considering, it would be equally absurd to hold that the plaintiff, by reason of having attempted, contrary to law, and by an agreement which has no validity in law, to convey a part of the subject of the suit to his attorney, has not only not succeeded in conveying it to his attorney, but has released it to the defendant.

§ 5. EFFECT OF THE LAW OF PLACE. In the foregoing opinion the learned judge intimates that he follows the ruling of the supreme court of Missouri (*Duke v. Harper*, 66 Mo. 51), which holds that the common law relating to the subject of champerty is in force in this state. This, of course, is the correct view, as applicable to any case where the validity of such a contract is properly drawn in question in a judicial proceeding. In such case a federal court, sitting in a particular state, would, if the champertous contract were to be performed in that state, in determining its validity, look to the law of that state as interpreted by its highest court, just as the courts of a sister state, or of a foreign country, would, if the validity of the same contract were drawn in question there. But where the validity of the contract is drawn in question collaterally, as in this case, I doubt whether a federal court is under any obligation to look to the decisions of the state courts as its rule of decision in the particular case. Suppose, for instance, that the supreme court of Missouri had held with the supreme court of Wisconsin (see *Barker v. Barker*, 14 Wis. 131), that it is a good defense to an

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action to show that it is being prosecuted under a champertous bargain between the plaintiff and his attorney, would a federal court sitting in Missouri be bound to decide the same question in the same way? It seems to me, not. I think that the question as thus presented relates rather to the discipline which every court exercises over its own attorneys, than to any rule of local municipal law. I should think, for instance, that a federal court sitting in Tennessee would not be bound, in disregard of the decisions of the supreme court of the United States, already quoted, to dismiss a suit in obedience to the mandate of the Tennessee statute, already referred to, upon it appearing that it was being prosecuted in pursuance of a champertous bargain between the plaintiff and his attorney. I do not find any intimation to this effect in the opinions of the federal courts which I have examined and cited above.

Upon the general subject of the effect of the law of place upon champertous bargains, it may be said that there is a presumption that the common law obtains in other states of the American Union, until the contrary is shown; and a champertous contract made and to be executed in one state, and sued on in a court of another state, will not be enforced in the absence of proof of the law of the former on the subject. *Thurston v. Percival*, 1 Pick. 415; *Elliott v. McClelland*, 17 Ala. 206, 210. On the other hand, a contract made in a foreign country and to be enforced in England, which would be void on the ground of champerty if made in England, is none the less void because, in the country in which it was made, it may have been lawful. In so holding, Erle, C. J., said: "The argument, that the agreement was valid because made in France, is disposed of by the fact that it was to be performed in England by an officer of an English court. It was clearly an invalid and illegal agreement. Assuming, therefore, that the agreement was not illegal in the country where it was made, it becomes illegal when sought to be enforced here." Williams, J., said: "According to the law of this country, the attorneys and suitors in Westminster Hall are subject to certain reciprocal duties and entitled to certain reciprocal rights. The client, on the one hand, is entitled to call upon his attorney to pay over to him all moneys which he has received for him; and the attorney, on the other hand, is entitled to hold them subject to his costs. We cannot allow these rights and duties to be overturned by agreements made abroad. This is an attempt to fetter the rules of our law in a manner which we cannot sanction." *Grell v. Levy*, 16 C. B. (N. S.) 73; S. C. 10 Jur. (N. S.) 210. This is but a declaration of the general principle that the validity of such contracts is to be determined by the law of the place of performance, as in the case of other contracts. *Richardson v. Rowland*, 40 Conn. 565.

ST. LOUIS, MO.

SEYMOUR D. THOMPSON.*

*In *Federal Reporter*.

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ROGERS v. MARSHALL et al.

(District of Colorado. December, 1881.)

1. **ATTORNEY AND CLIENT—PURCHASE BY ATTORNEY FROM CLIENT PENDENTE LITE.**—The question whether an attorney at law can, under any circumstances, purchase *pendente lite* from his client the subject matter of litigation in which he is employed and acting, suggested, but not decided.
2. **SAME—SAME—ATTORNEY CANNOT ACT IN THE DOUBLE CAPACITY OF ADVISER OF CLIENT AND PURCHASER FROM HIM.**—Equity will not uphold such a sale, even upon a showing of good faith, where it appears that the attorney, while negotiating for the purchase of the property, was at the same time advising the client as to the probable outcome of the litigation concerning it.
3. **SAME—SAME—SAME.**—It is contrary to law and equity to permit an attorney, at the same time and in the same transaction, to occupy the antagonistic and incompatible positions of adviser of the client, concerning the pending litigation threatening his title to property, and of purchaser of such property from him.
4. **SAME—DUTY OF ATTORNEY TO MAKE FULL DISCLOSURE.**—Some of the rules regulating dealings between client and attorney stated. The former must make full disclosure of every fact which might influence the decision by the client of the question of the sale. All presumptions are against the attorney.
5. **SAME—IF ATTORNEY PURCHASES FOR A THIRD PARTY, HE MUST DISCLOSE THE FACT.**—If an attorney can show that he is entitled to purchase property, notwithstanding his character of attorney, yet if, instead of openly purchasing it, he purchases it in the name of a third person, without disclosing the fact, the purchase is void; and the same rule prevails where the attorney, while professing to purchase for himself, really purchases in part for his client's co-partners, and suppresses the fact.
6. **SAME—SUCH THIRD PARTIES STAND IN THE ATTORNEY'S SHOES.**—Where an attorney purchases from his client in his own name, but in secret trust for third parties, to whom he subsequently conveys, such third parties stand in his shoes, taking the chances as to the validity of the purchase.
7. **ATTORNEY AND CLIENT—WHAT CONSTITUTES THE RELATION.**—Where an attorney appeared of record for a client, with the client's knowledge and consent, and conducted a litigation, nothing more was necessary to constitute the relation of attorney and client.
8. **TRUST—FRAUDULENT CONVEYANCE—SUBSEQUENT PURCHASER WITH NOTICE.**—A subsequent purchaser with notice from a fraudu-

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lent vendee may in equity be charged as trustee, but to the extent only of the interest which the vendor had at the time of the sale.

9. **EQUITY PLEADING—ANSWER—FAILURE TO DENY.**—Where an answer in chancery neither admits nor denies the allegations of the bill, and is not excepted to, the allegations of the bill must be proved.
10. **REHEARING IN EQUITY—NEWLY DISCOVERED EVIDENCE.**—Questions once fully litigated will not be opened for rehearing, for the purpose of re-examining witnesses once examined, nor to admit evidence that is merely cumulative.

This was a suit in equity, brought to set aside the sale and conveyance from complainant to respondent Marshall, of a valuable mining property in Colorado, known as the "Robert E. Lee Mine." The purchase of the property was effected by respondent Marshall, who took the title in his own name, while he was an attorney for the complainant in a certain litigation concerning the title to the property. His purchase was, in fact, for himself, and certain of the other respondents who were previously part owners with complainant in the mine, and the fact that the latter were interested in the purchase was not disclosed to complainant. There was proof tending to show that Marshall gave to an agent of the complainant such information as he possessed concerning the value of the mine, and advised said agent to ascertain the facts for himself, but did not advise the employment of an expert to make an examination and estimate the value of the mine, although complainant's agent was not himself an expert. While negotiating for the purchase, and as part of such negotiation, Marshall advised complainant concerning the probable outcome of the pending litigation, in which he was her counsel. The price paid complainant for her interest was \$45,000, while the testimony tends to show that the real value of the same was over half a million.

L. S. Dixon, for complainant.

Wells, Smith & Macon, for the respondent.

McCrary, Circuit Judge.—1. It is not necessary to decide the question whether an attorney at law can, under any cir-

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cumstances, purchase *pendente lite* from his client the subject matter of a litigation in which he is employed and acting.

2. Equity will not uphold such a sale, even upon a showing of good faith, where it appears, as in this case, that the attorney, while negotiating for the purchase of the property, was, at the same time, and as part of the negotiations, advising the client as to the probable outcome of the litigation concerning it.

It is difficult to see how it is possible for an attorney, under such circumstances, to deal with his client at arm's length; for the client's acceptance or rejection of any proposition for a purchase by the attorney must depend upon the nature of the advice he receives from him touching the pending litigation. In other words, the attorney must, as to an important part of the negotiation, represent both sides; that is, his own private interest, and the opposing interest of his client — a thing which is manifestly contrary to law and abhorrent to equity.

The client must, in such cases, act upon the attorney's advice and opinion as to the merits of the pending litigation about the property, and by the light of such advice he must fix the price at which he will sell. Even if under some circumstances the property in controversy in a suit may, pending the suit, be sold by the client to the attorney, I am of the opinion that a court of equity ought to hold that such a sale is absolutely void, if the attorney, while negotiating as a purchaser, is called upon to advise the client, as an attorney, as to how far a pending litigation is likely to affect his title to the property, or the value of his interest therein.

It is contrary to the policy of the law, and certainly contrary to the principles of equity, to permit an attorney at law to occupy, at the same time and in the same transaction, the antagonistic and wholly incompatible position of adviser of his client concerning a pending litigation threatening the client's title to property, and that of purchaser of such property from the client. If an attorney can deal with his client concerning such property at all, he must, before doing so, for

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the time at least, divest himself of the character of attorney, so that his former client may deal with him as a stranger. This is not the case when the attorney negotiates with the client as the purchaser of such property, and at the same time advises him as counsel concerning the title to it, or concerning its value, as affected by pending litigation.

3. To sustain a sale from client to attorney, the burden is upon the latter, and he must show that he has done as much to protect the client's interests as he would have done in the case of his client's dealing with a stranger.

The court will watch such a transaction with jealousy, and throw on the attorney the burden of proving that the bargain is, generally speaking, as good as any that could have been obtained by due diligence from any other purchaser.

An attorney can not in any case sustain a purchase from his client without showing that he communicated to such client everything necessary for him to form a correct judgment as to the real value of the subject of the purchase, and as to the propriety of selling for the price offered. And neglect of the attorney to inform himself of the state of facts will not enable him to sustain a purchase from his client for an inadequate consideration.

The attorney must show that all the considerations which should have operated to prevent the sale by the client were presented by him with the earnestness of a man who was anxious only for the client's good.

It must be made to appear that the client is no worse off than he would have been had he consulted an adviser who had no interest and no selfish end in view. It must appear also that the attorney took such measures to inform himself as to the value of the property offered for sale by the client as are ordinarily taken by persons dealing in such property under like circumstances, and that, being himself thereby informed, he communicated all his information upon the subject to his client. Authorities by which these general rules are established will be found cited in Weeks on Attorneys

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at Law, under the head of "Dealings between attorney and client," pp. 450-469, and in White & Tudor's Leading Cases in Equity, Hare & Wallace's Notes, vol. 2, part 4, pp. 1216-1225. It does not, in my opinion, appear that respondent Marshall cautioned and advised his client, the complainant, as fully as the law, as above set forth, required.

An attorney who knows nothing of the value of property offered for sale by his client, and is aware that his client is in like ignorance upon that subject, is bound, before advising a sale by the client to a stranger, and *a fortiori* before attempting to purchase from the client himself, to make careful inquiry and to inform himself as fully as possible concerning such value. If a stranger had appeared and opened negotiations with complainant for the purchase of her interest in the mine, and she had applied to Marshall, as her attorney, for advice concerning the sufficiency of the price offered, it would have been his duty, being himself ignorant upon the subject, to advise an investigation by a competent person, as a means of ascertaining the probable or approximate value of the property.

It is true that Marshall had, up to the time when the negotiations for a purchase by him commenced, been the attorney of complainant only for the purpose of defending her title, and having no occasion to inquire into the question of the value of the mine; but the moment these negotiations were opened the relation was changed, and it became his duty to use due diligence to ascertain the value of the property as nearly as possible, and to advise complainant or her agent. It was at least his duty to suggest an investigation by the usual method. If he had, without knowledge as to the value of the property, and without suggesting an investigation, advised a sale to a third party at a price which proved to be inadequate, it is clear that he would have failed in his duty, and it is equally clear that he could not purchase under like circumstances.

His own ignorance as to the value of the property, so far

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from being a circumstance in his favor, is a strong reason for holding that he was bound to inform himself so as to be able to advise his client.

4. I hold, further, that the respondent Marshall, before consummating his purchase from complainant, was bound to disclose to her, or her agent, the names of all persons interested with him in the purchase, and especially that her partners in the mine were secretly interested as such purchasers.

The rule is, that the attorney must make a full disclosure of every fact which might influence the decision by the client of the question of the sale. All the presumptions are against the attorney.

The court cannot presume that the fact that her partners were secret purchasers with Marshall would have had no influence upon complainant's mind if disclosed. If it had been known by her that her copartners wished to purchase part of her interest, and yet did not wish her to know the fact, and had therefore employed Marshall to purchase in his own name for them, it might well have aroused suspicion in her mind, and very probably would have led her to decline to sell, or caused her to employ other counsel, or to institute further inquiry as to the character and value of the property. It has been held that, if an attorney can show that he is entitled to purchase property, notwithstanding his character of attorney, yet if, instead of openly purchasing it, he purchases it in the name of a third person without disclosing the fact, the purchase is void. *Weeks on Attorneys at Law*, p. 463, and cases cited.

The same rule must prevail where the attorney, while professing to purchase for himself from his client, really purchases in part for his client's copartners and suppresses this fact.

5. The parties interested with Marshall in the purchase, and who afterwards took conveyances from him, stand in his shoes so far as the complainant's rights are concerned. They knew that the relation of attorney and client existed

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between complainant and Marshall, and they took the chances as to the validity of the latter's purchase. If the sale is void as to him, it is also void as to them; and in that case it is unnecessary to inquire into the allegations or examine the proofs as to the misconduct on the part of complainant in connection with the sale in question.

When an attorney purchases from his client in his own name, but in secret trust for third parties, it will not, of course, be insisted that such third parties can be regarded as innocent purchasers, or as entitled to any greater rights or better title than the attorney himself secures.

NOTE from Central Law Journal: The doctrine of the foregoing case is far-reaching in its effect, and amply supported by authority.

When an attorney purchases, *pendente lite*, from his client, the subject matter of a litigation in which he is employed, a presumption of bad faith arises, and the burden of proof is upon the attorney to show the entire fairness and the utmost good faith of the transaction, and that no advantage was taken of the client; otherwise the purchase must fall. This proposition is so well established, both upon principle and authority, that it is scarcely necessary to cite the cases supporting it.

The leading case upon the subject of purchases by persons thus occupying confidential relations towards the vendor is probably *Fox v. Mackreath*, 1 Lead. Cas. in Eq. part 1; White & Tudor (4th Am. ed.), p. 188, § 115. There the court held that a purchase by a trustee for sale from his *cestui que trust*, although he may have given an adequate price and gained no advantage, should be set aside at the option of the *cestui que trust*, unless the connection between them had been dissolved, and the knowledge of the value of the property acquired by the trustee had been communicated to the *cestui que trust*. Exhaustive notes are added to the report of this case by the very able editors, and most of the cases relating to purchases by persons occupying confidential and fiduciary relations are reviewed. ["The great principle by which courts of equity are governed in such cases is this: that he who bargains in matters of advantage, with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence. This rule, in its principle, applies equally to parents, guardians, trustees, pastors, medical advisers, and all others, standing in confidential relations with those with whom they treat;—the burden of proof being devolved in equity on such persons to establish affirmatively the perfect fairness, adequacy, and equity of their respective claims." 8 Greenl. on Ev. (Redf. ed.) sec. 253; 1 Story Eq. Jur. (11th ed.) sec. 311.]

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The rule, as thus stated, has been applied to trustees, parents, guardians, receivers, assignees in bankruptcy and insolvency, directors of associations and corporations, medical and spiritual advisers, and many others, including the class known as attorneys. See note to *Fox v. Mackreath*, *supra*; 3 Greenl. on Ev. (Redf. ed.) sec. 253, note 8. The expression "attorneys" may be regarded as comprehending all grades of practicing lawyers, such being the sense in which the term is used in the United States, the old distinctions as to barristers, advocates, etc., being obsolete. Weeks on Attorneys at Law, p. 61, sec. 35; Wharton on Agency, sec. 555.

The confidential nature of the relation between attorney and client gives the attorney such an opportunity to exercise an influence over his client, not possible otherwise, that the courts do not hesitate to declare transactions between them void, which, as between parties occupying other relations, would be entirely unobjectionable. *Cook v. Berlin Woolen Mill*, 43 Wis. 433; *Mills v. Mills*, 26 Conn. 213; *Payne v. Avery*, 21 Mich. 524; *Bibb v. Smith*, 1 Dana (Ky.), 582; *Starr v. Vanderheyden*, 9 Johns. 253. It was well said by Chancellor Westbury: "There is no relation known to society, of the duties of which it is more incumbent upon a court of justice to strictly require a faithful and honorable observance, than the relation between solicitor and client." *Tyrrell v. Bank of London*, 10 H. L. C. 26, 43.

The unbroken current of authority establishes the statement of law made at the head of this note, and many of the cases go even beyond it, and hold that a purchase by an attorney from his client can, under no circumstances, be maintained. *Gibson v. Jeyes*, 6 Ves. 266; *Tyrrell v. Bank of London*, 10 H. L. C. 26, 43; *McPherson v. Watt*, 3 App. Cas. H. L. & P. C. 254; S. C. 24 Moak, 174, 190, 191; *Carter v. Palmer*, 8 Cl. & F. 657; *Salmon v. Cutts*, 4 DeG. & Sm. 125, affirmed 16 Jur. 623; *Pearson v. Benson*, 28 Beav. 598; *Gresley v. Mousley*, 4 DeG. & J. 78; *Ex parte James*, 8 Ves. 848; *Newman v. Payne*, 2 id. 199; *Welles v. Middleton*, Cox's Cas. in Eq. 112; *Billage v. Southee*, 9 Hare, 534; *Hunter v. Atkyns*, 3 M. & K. 113; *Harris v. Prementure*, 15 Ves. 40; *Wright v. Proud*, 13 Ves. 138; *Rhodes v. Bate*, L. R. 1 Ch. App. 252; *Bellew v. Russell*, 1 Ball & Beatty, 96; *Hall v. Hallett*, 1 Cox, 134; note to *Fox v. Mackreath*, *supra*; *Howell v. Ransom*, 11 Paige, 540; *Jennings v. McConnel*, 17 Ill. 148; *Hawley v. Cramer*, 4 Cow. 717; *Evans v. Ellis*, 5 Denio, 643; *Gray v. Emmons*, 7 Mich. 533; *Miles v. Ervin*, 1 McCord (S. C.) Ch. 524; *McMahan v. Smith*, 6 Heisk. (Tenn.) 167; *Kisling v. Shaw*, 83 Cal. 425; *Wright v. Walker*, 30 Ark. 44; *Ryan v. Ashton*, 42 Iowa, 365; *Roman v. Mali*, 42 Md. 513; 1 Perry on Trusts, § 166; *Harper v. Perry*, 28 Iowa, 60; *Trotter v. Smith*, 59 Ill. 244; *Howell v. Baker*, 4 Johns. Ch. 120; *Wade v. Pettibone*, 11 Ohio, 60; *Case v. Carrol*, 85 N. Y. 388; *Manning v. Hayden*, 5 Sawyer C. C. 360; *Baker v. Humphrey*,

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101 U. S. 494; and see especially, Weeks on Attorneys at Law, sections 268 to 277, where the subject is learnedly discussed.

In one of the early cases, Lord Eldon laid down the general principle regarding the right of an attorney to purchase from his client property pending litigation, in the following language: "An attorney buying from his client can never support it, unless he can prove that his diligence to do the best for the vendor has been as great as if he was only an attorney dealing for the vendor with a stranger. If it appear that in that bargain he has got an advantage by his diligence being surprised, putting fraud and incapacity out of the question, which advantage, with due diligence, he would have prevented another person from getting, a contract under such circumstances shall not stand. . . . If an attorney does mix himself with the character of vendor, he must show to demonstration — for this must not be left in doubt, — that no industry he was bound to exert would have got a better bargain." *Gibson v. Jeyes*, 6 Vesey, 266.

The principle which Lord Eldon thus settled was in effect this: that when the confidential relation of attorney and client existed, the duty was incumbent upon the attorney to make the best possible disposition of his client's interest; and if he failed in this he was derelict in his duty. If he sold without the exercise of diligence in knowing the true value of property, he would be guilty of negligence, and responsible to his client; therefore, upon selling to himself, it would not lie in his mouth to say that he did not know the value of the property. Such appears to be the true rule. *Greenlaw v. King*, 8 Beav. 49; *In re Bloye's Trusts*, 1 Mac. & G. 488; *Grover v. Hugell*, 3 Russ. 428; *White v. Whaley*, 3 Lans. (N. Y.) 327; *Howell v. Ransom*, 11 Paige, 540; Weeks on Attorneys at Law, 458, sec. 273. And thus, before purchasing, the attorney is bound to disclose to his client all the information he possessed or could have obtained upon the subject; and upon purchasing must pay a fair and adequate price. *Coffee v. Ruffin*, 4 Cold. 487; *Michoud v. Girod*, 4 How. 503; *Brook v. Berry*, 2 Gill (Md.), 99; *Keighler v. Savage Mfg Co.* 12 Md. 383; *Puzey v. Senier*, 9 Wis. 870; Weeks on Attorneys at Law, sec. 273. Chancellor Walworth, in *Howell v. Ransom*, *supra*, in treating of this subject, said: "The attorney, therefore, can never sustain a purchase of this kind, without showing that he communicated to his client everything which was necessary to form a correct judgment of the actual value of the subject of the purchase, and as to the property selling at the price offered; and his neglect to ascertain the true state of facts himself will not sustain his purchase." As expressed in apt terms by Lord Blackburn, in all such cases the attorney must put himself at "arm's length from his client." *McPherson v. Watt*, 3 App. Cas. H. L. & P. C. 254.

It must follow that, since the rule is so strict as to sustaining pur-

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chases by attorneys from their clients, the probabilities being that an attorney, who would conceive the purpose to defraud, would not disclose it, nor show that he did in fact act in bad faith, a suspicion of distrust and disbelief naturally follows. *Ex parte Lacey*, 6 Ves. 627; *Coles v. Trecothick*, 9 id. 234; *Phillips v. Homphrey*, L. R. 6 Ch. App. 770. It may be observed, as was held by Chancellor Kent in *Davou v. Fanning*, 2 Johns. Ch. 252, that there may be fraud and a party not able to prove it; therefore, to guard against this uncertainty and hazard of abuse, the sale is declared void at the option of the client, upon the very slightest proof. For this reason it is not necessary to prove any actual fraud. Weeks on Attorneys at Law, sec. 268.

The presumption of bad faith continues as long as the relation of attorney and client exists; and when the actual relation is completely dissolved, and the parties are no longer under the antecedent influence, the rule ceases. *Gibson v. Jeyes*, 6 Ves. 268; *Rose v. Mynatt*, 7 Yerg. (Tenn.) 30; *Phillips v. Overton*, 4 Hayw. (Tenn.) 291; *Mason v. Ring*, 3 Abb. Ct. of App. (N. Y.) 210. Yet, while this is so, the rule does not lose its application while the influence remains, even though the relation has been technically dissolved. *Mason v. Ring*, 3 Abb. Ct. of App. (N. Y.) 210; *Coffee v. Ruffin*, 4 Coldw. 487; *Rhodes v. Bate*, 1 L. R. Ch. App. 252; *Gibbs v. Daniels*, 4 Giff. 1; *Zeigler v. Hughes*, 55 Ill. 288; Weeks on Attorneys at Law, sec. 273, p. 457.

Even where the purchase by an attorney from his client is sustained, it is only upon the ground that the transaction was free, open and unreserved; and, therefore, if it appear that there was any underhand dealing, such as the purchase in the name of a third person, without the fact being disclosed to the client, the transaction will not be sustained. Weeks on Attorneys at Law, 463, sec. 275; *Lewis v. Hillman*, 3 H. L. C. 607. See also *Murphy v. O'Shea*, 2 Jones & Lat. 422; *Charter v. Trevelyan*, 11 Cl. & F. 714; *Walsham v. Stainton*, 1 DeG. J. & Sm. 678; *Abbott v. American Ins. Co.* 33 Barb. (N. Y.) 278; *Forbes v. Halsey*, 26 N. Y. 53. So, if the negotiations between the attorney and client have been carried on in a third person's name, the latter being at the time interested with the attorney, the purchase must fall. *Zeigler v. Hughes*, 55 Ill. 288.

The attorney, who is under a disability to purchase for himself, is likewise inhibited from purchasing for another. *Remick v. Butterfield*, 11 Foster (N. H.), 70; *Cumberland Coal Co. v. Sherman*, 30 Barb. (N. Y.) 553; *Brackenridge v. Holland*, 2 Blackf. 377; *Martin v. Wyncoop*, 12 Ind. 266. This for the obvious reason that the influence will operate upon the client, and the purchaser takes the property subject to the acts of the attorney in buying, who, in fact, acts for him. *O'Dell v. Rogers*, 44 Wis. 136; *Hoffman, etc. Co. v. Cumberland, etc. Co.* 16 Md. 456; *McPherson v. Watt*, 3 App. Cas. H. L. & P. C. 254. So, should an attorney

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sell for his client, and soon thereafter obtain a conveyance from the purchaser to himself, a court of equity would regard the transaction with great jealousy, and set the whole proceedings aside upon slight proof; yet this presumption of bad faith may be repelled. *Obert v. Obert*, 2 Stock. Ch. 98; *Cook v. Berlin Woolen Mill*, 43 Wis. 433-441; *Waterman v. Skinner*, 1 Beas. 423; *Rosenberger's Appeal*, 2 Casey, 67; *Bellamy v. Sabine*, 2 Phil. 425.

The fact that the client is desirous of selling does not change the relations or rights of the parties. *Gibson v. Jeyes*, 6 Ves. 266; *McPherson v. Watt*, 3 App. Cas. H. L. & P. C. 254; *McCormick v. Martin*, 5 Blackf. 509; *Gresley v. Mousley*, 4 DeG. F. & J. 438.

It was urged, in the principal case, that under no circumstances could the purchase by an attorney from his client, of property pending litigation, be sustained. There are cases upholding this view, the reasons being that public policy requires the prohibition, so that there can be no opportunity for the perpetration of a wrong by the attorney. Note to *Huguenin v. Baseley*, 2 Lead. Cas. in Eq. pt. 2, White & Tudor, 1223; *Harper v. Perry*, 28 Iowa, 57; *Hall v. Hallett*, 1 Cox, 134; *Wright v. Walker*, 30 Ark. 44; *Ex parte Bennett*, 10 Ves. 381; *Ex parte James*, 8 id. 337; *Gillett v. Gillett*, 9 Wis. 194; *Michoud v. Girod*, 4 How. (U. S.) 506; *In re Taylor Orphan Asylum*, 36 Wis. 552; *Starr v. Vanderheyden*, 9 Johns. 253; *Torrey v. Bank of Orleans*, 9 Paige, 649; *Atkins v. Delmege*, 12 Ir. Eq. 1; and the cases cited in counsel's brief to *Cook v. Berlin Woolen Mill*, 43 Wis. 433, on page 437 of the report.

Probably the better rule is, that such transaction is not necessarily void, but the burden is upon the attorney to show its validity, under the principles stated. The question was recently presented to the supreme court of the United States, in the case of *Pacific R. Co. v. Ketchum*, 101 U. S. 289, where it was held that the purchase by a solicitor of a railroad company of its property at a judicial sale was not of itself invalid. Chief Justice Waite said: "If there had been any proof of collusion or improper conduct on the part of the solicitor, resulting in a wrong to the company, the case would be different. As it is, we are called upon to decide whether a purchase in the name of a solicitor of one whose property is sold, is necessarily, in and of itself, invalid. We think it is not. It will be scrutinized closely, but until impeached must stand. Slight circumstances may impeach it, but it is not under all circumstances invalid." It may be noticed that there the purchase was made at a judicial sale, but the same rule has been applied to private purchases. *Coffee v. Ruffin*, 4 Coldw. 487; *Hess v. Voss*, 52 Ill. 472; *Nesbit v. Lockman*, 34 N. Y. 167; *Kisling v. Shaw*, 33 Cal. 425; *Miles v. Ervin*, 1 McCord Ch. (S. C.) 524; *Roman v. Mali*, 42 Md. 513. See also *Spindler v. Atkinson*, 3 Md. 409; *Buell v. Buckingham*, 16 Iowa, 284; *Delemater's Estate*, 1 Wharton, 363; *Wendell v. Van Rensselaer*, 1 Johns.

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Ch. 342; Weeks on Attorneys at Law, 459, sec. 278; Story Eq. Jur. sec. 311; and note to *Fox v. Mackreath*, *supra*, 260.

Whatever may be the correct principle, it must be that the sale is not absolutely void, but only voidable at the option of the client. Therefore if, after a full knowledge of all the circumstances, the client shall elect to confirm the sale to the attorney, and the influence no longer exists, such election will be held binding. *McCormack v. Martin*, 5 Blackf. 509; *Williams v. Reed*, 3 Mason, 405; note to *Fox v. Mackreath*, *supra*, 257. And it has been held that no one but the client can avoid the sale. *Leach v. Fowler*, 22 Ark. 143; *Wall v. Cockerell*, 10 H. L. C. 229. And so in the following cases, where a trustee purchased, it was held that a stranger could not avoid the sale: *Jackson v. Van Dalfsen*, 5 Johns. 43; *Rice v. Cleghorn*, 21 Ind. 80; *Remick v. Butterfield*, 11 Foster (N. H.), 70; *Jackson v. Walsh*, 14 Johns. 407; *Wilson v. Troup*, 2 Cowen, 196. A subsequent grantee cannot insist upon the rule. *Cowan v. Barrett*, 18 Mo. 247. And see *Lathrop v. Wightman*, 5 Wright, 297.

The principles herein set forth apply with equal force to transactions had by the client with the attorney's managing clerk. *Poillon v. Martin*, 1 Sandf. Ch. 560. And where a person acted as a confidential adviser in a suit before a magistrate, before whom attorneys did not appear, it was held that he so far filled the place of an attorney for the party for whom he acted as to bring himself within the rule avoiding transactions between attorney and client. *Buffalow v. Buffalow*, 2 Dev. & Bat. (N. C.) Eq. 241. It is but reasonable that this should be so, for the same danger of undue influence over the client must necessarily exist. The client being a creature of confidence, the failure of the person acting as attorney to have himself enrolled ought not to change the rule. *Trulove v. Cole*, 41 Barb. (N. Y.) 318; *Todd v. Grove*, 33 Md. 183.

It may, however, possibly be, that the doctrine relating to privileged communications between attorney and client, as to whom the privilege extends and the reasons therefor, would have some bearing upon this question. That subject is fully treated by Mr. Weeks, in his valuable work on Attorneys, at section 161, and it would extend this note to an unwarrantable length to attempt here to state whether the doctrine would have any application, and, if so, to endeavor to define what persons would come within the principle.

FRANK HAGERMAN.

KEOKUK, IOWA.

Afterwards, upon petition for rehearing, the following opinion was delivered:

McCRARY, *Circuit Judge*.—This important case has been exhaustively reargued by eminent counsel upon a petition for

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rehearing based (1) upon the record as it stood at the former hearing, and (2) upon alleged newly discovered evidence. The questions raised, some of them now for the first time, have been carefully considered and the conclusions reached are as follows:

1. On the former hearing it was held, as will be seen by the opinion then announced, that an attorney at law cannot purchase from his client the subject matter of litigation in which he is employed and acting, if, as a part of his negotiations for the purchase, he advises his client as to the probable outcome of the litigation and its effect upon the value of the property he is seeking to purchase. Counsel for respondents, both upon the former hearing and upon the reargument, have insisted that such is not the law, and that if, under such circumstances, the attorney can show that he gave honest and sound advice concerning the pending litigation, and otherwise discharged the duties imposed upon him by fully disclosing all his knowledge of the value, etc., the sale is valid. There are certainly some respectable authorities holding that a purchase by an attorney from his client of the subject matter of the litigation *pendente lite* is void not only for champerty, but also on grounds of public policy. *West v. Raymond*, 21 Ind. 305; 4 Kent's Com. (10th ed.) 530; *Simpson v. Lamb*, 40 Eng. Law & Eq. 59; *Hall v. Hallett*, 1 Cox, 134; *Wood v. Downes*, 18 Vesey, 120. I will assume, however (without deciding), that the rule is the other way; and that an attorney may purchase from his client the subject matter of the suit in which he is employed and acting; provided, before the negotiations are opened, the relation of attorney and client is ended, or at least for the time being suspended, and the client placed in a position to deal with the attorney upon terms of perfect equality. It may be conceded that such is the rule and still the doctrine heretofore announced in this case may be perfectly sound.

According to all the authorities, it is, at all events, clear that in order to uphold such a transaction the client must be

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placed in a position such as to enable him to deal with the attorney at arm's length. The relation of attorney and client must be, so far as the transaction of purchase and sale is concerned, dissolved and ended. In that transaction the attorney cannot act as such. If it becomes necessary or desirable for the client to be advised as to the nature of the pending litigation and the danger to his title to be apprehended therefrom, as a means of determining the question of selling or of fixing the price, the attorney must decline to give him advice upon those points and the client must employ other counsel, or act upon his own judgment. There is a plain and necessary distinction between the right of the attorney under such circumstances to give the client information touching the value of the property in the market, and his right to advise him upon the legal questions involved in the pending litigation. As to the former, the attorney and client may be equally well advised, and when they are so advised they may stand on an equality and at arm's length; but as to the latter this is not so. The questions of law presented by a litigation in which the attorney has been employed are matters within his own peculiar knowledge; he deals with them as an expert; they are frequently questions of a technical, and always of a professional character. They are often questions which go to the very root and marrow of the inquiry which the seller must make in determining the price at which he will sell. This is well illustrated by the present case, since it appears that Marshall, the attorney, was defending for the complainant and others certain suits involving the validity of her title, and which, if decided adversely to her, would have destroyed every vestige of her property in the mine. It follows, therefore, that to decide the question whether these suits were well grounded, or whether there was danger of a decision therein adverse to complainant, was to decide upon the question of the value of complainant's interest. To allow Marshall to advise her or her agent upon this question

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was to enable him to influence materially the fixing of the value of the property while negotiating for its purchase. The law will not permit an attorney to deal with his client in this way. Such dealing is manifestly against the policy of the law; as much so as a purchase by a guardian from his ward, or that of a trustee from his *cestui que trust*. Such transactions are not held to be void upon the ground of intentional fraud, or proven bad faith; but because the relations of the parties are such that the one may make use of his position of power and influence over the other, or of his superior knowledge derived while in the employment of the other, to take an unfair advantage of him. The law, upon grounds of high public policy, seeks to destroy the temptation to abuse such opportunities, and therefore does not inquire whether the transaction was fraudulent or not. In such a case the attorney, by continuing to advise the client about the pending litigation, while at the same time negotiating for the purchase of the property in controversy in such litigation, confounds his position as attorney with that of purchaser, and, however honest he may be, the purchase is not permitted in any case.

“The general interests of justice requiring it to be destroyed in every instance, and no court is equal to the examination and ascertainment of the truth in much the greater number of cases.” *Hawkley v. Cramer*, 4 Cowen, 737.

“Where fidelity is required, the law prohibits everything which presents a temptation to betray the trust. The orison which deprecates temptation is the offspring of infinite wisdom, and the rule of law in accordance with it rests upon most substantial foundations.” *Henry v. Raiman*, 25 Penn. St. 359.

“Where the law creates fiduciary relations, it seeks to prevent the abuse of confidence by insuring the disinterestedness of its agents. It holds the relations of judge and party, of buyer and seller, to be entirely inconsistent. The temptation to the abuse of power for selfish purposes is so great

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that nothing less than incapacity is effectual, and thus a disqualification is wrought by the mere necessity of the case. Fullness of price, absence of fraud and fairness of purchase are not sufficient to countervail this rule of policy. To give it effect it is necessary to recognize a right in the former owner to set the sale aside in all cases on repayment of the money advanced." *Armstrong v. Huston's Heirs*, 8 Ohio, 554.

Upon this branch of the case, after full reconsideration of the question, I am constrained to adhere to the rule announced upon the former hearing.

2. It is insisted that the relation of attorney and client did not in fact exist between the complainant and Marshall at the time of the sale. The proof shows to my entire satisfaction that the relation did exist at that time. Without recapitulating the evidence upon this point, it is sufficient to say that, in my judgment, it clearly shows that Marshall was employed by the persons known as the "Colorado Springs parties," of which complainant was one. These persons were joint owners of the same interest in the mine. Nothing was more natural than that the same counsel should be retained for all. The record shows that Marshall appeared for the complainant as well as for the others. That complainant was aware of this arrangement and acquiesced in it, is abundantly shown, and nothing more was necessary to constitute the relation of attorney and client. I think it is also clear that while other attorneys were consulted, Marshall, who resided at Leadville, where the mine is situated, was chiefly relied upon. I am also satisfied that the attorney's fees were to be paid, and were paid, out of the proceeds of the mine. The original evidence tends to show this, and if it were not so, it would have been distinctly denied by some or all of the respondents. Add to these considerations the fact that the relation is distinctly admitted by all the respondents in their amended answer, and I think the fact must be regarded as settled. It is true that the suits against the complainant and others had, at the time of the sale, been suspended with the

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understanding that in case of a compromise they should be dismissed; but they had not been dismissed, and it was well understood that if the settlement was not accomplished the suits must go on. So that the relation of attorney and client existed in full vigor. If complainant did not sell, she had to contemplate a continuance of the litigation as at least possible. The questions involved in the litigation, in case it did go on, were of the gravest importance to her; and it was upon the nature and character of those questions, and the danger to be apprehended from an adverse decision of them, that the advice of Marshall was sought and obtained upon her behalf as a part of the negotiations for the sale.

3. It is insisted that complainant has not shown that she ever had a valid title to a share in the mine, or that the respondent, the Robert E. Lee Mining Company, bases its claim of title upon the conveyance executed by her to Marshall. This is a very material question in the case, and it is now for the first time presented. It has been heretofore assumed that the complainant was the owner, in equity at least, of the undivided one-third of the mine at the time of her sale and conveyance to Marshall. The title to the mine is now in the respondent, the Robert E. Lee Mining Company, conveyance to that company having been made some time after the purchase by Marshall. If that company is a subsequent purchaser with notice of the rights of the complainant, it may be charged as trustee for complainant to the extent only of the interest which she had, and which the company has acquired. But if the complainant had no title, and the company acquired nothing by virtue of her conveyance to Marshall, she cannot, of course, subject to her use any title it derived from another source. It is now said that complainant held under an option bond; that all her rights under said bond had been forfeited; that she had no title, and that the company derived a perfectly good title from the patentee. If so, the fact may be shown; and if shown, the complainant cannot recover as against the company. Further considera-

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tion of this defense will be reserved until proof applicable to it has been produced and the parties are heard thereon.

4. It is insisted that the respondent, the Robert E. Lee Mining Company, is a *bona fide* purchaser for value and without notice. Upon the consideration of this part of the defense some very important questions may arise respecting the rights of the corporation, and as to how far and under what circumstances notice to the incorporators, stockholders or directors will constitute notice to the corporation. The further consideration and final determination of these questions may well be postponed until the final hearing.

5. It is insisted that complainant should be denied relief on the ground of laches. As at present advised, I should be inclined to hold that the complainant's delay in bringing suit, and her failure promptly upon discovering the fraud to give notice of her purpose to rescind the contract of sale, are fatal to her right of recovery, at least as against the respondents who are not named in the original bill. I shall, however, reserve the determination of this question until the final hearing.

6. Some of the material allegations of the bill are not denied by the answer, and the question is made whether such allegations stand admitted or must be proved. Upon re-examination of the authorities I have reached the conclusion that, in cases where the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. *Young v. Grant*, 6 Cranch, 51; *Brown v. Pierce*, 7 Wall. 211; *Brooks v. Byam*, 1 Story, 297.

7. It is insisted that the complainant has not shown that Marshall secretly purchased on behalf of Howbert and his associates. The conclusion reached upon the former hearing, that Howbert, Sigafus, Crowell and Humphrey were secretly interested in the purchase made by Marshall, was based partly upon the pleadings and the failure of the respondents distinctly to deny the allegations of the bill upon this subject, and partly upon the evidence and the facts and circum-

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stances which in the judgment of the court clearly pointed to this conclusion. Leaving out of view any consideration of the pleadings in the case, I am still inclined to adhere to the conclusion originally announced. As, however, it may not be entirely clear that all of the defendants here named were advised of Marshall's intended purchase, and promised an interest therein before it was consummated, I am disposed to leave this question open for further consideration upon the final hearing.

8. The application for rehearing upon the ground of newly discovered evidence is next to be considered. The affidavits filed in support of this application show that the newly discovered evidence is directed mainly, if not wholly, to the following questions: 1. What was the actual value of the complainant's interest in the mine at the time of her sale to Marshall? 2. Was there actual fraud or concealment practiced by Marshall in making said sale? 3. Did the relation of attorney and client exist between complainant and Marshall at that time? Upon all of these points the proposed testimony, even if newly discovered and material, is only cumulative. These points were fully litigated upon the former hearing, and, according to the well-settled rule in such cases, they cannot now be reopened for further consideration. The objection to the admission of the alleged newly discovered evidence on the ground that it consists of the testimony of witnesses who have been once examined is also well taken. A court of equity cannot afford to establish a precedent which will allow the defeated party, after discovering where the cause pinches, to look out witnesses to bolster up the faulty parts of his cause. To allow this would be to make litigation practically interminable, and would also lead to perjury. *Ruggles v. Eddy*, 11 Blatchf. 524; *Page v. Tel. Co.* 11 Blatchf. 118; *Jones v. Purefoy*, 1 Vernon, 45; *Finley v. Tyler*, 3 T. B. Monroe, 400; *Brewer v. Bowman*, 3 J. J. Marshall, 492.

The application for rehearing upon the questions above

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stated, on the ground of newly discovered evidence, is overruled.

The result of the foregoing views is that the interlocutory decree heretofore rendered must be set aside, and that the case must be considered as reopened for further hearing upon the following questions only:

1. Whether the complainant must fail in this action upon the ground that she had no title to the one-third interest in the mine which she sold and conveyed to Marshall?

2. Whether the respondent, the Robert E. Lee Mining Company, is, as against the complainant, an innocent purchaser for value and without notice?

3. Whether the complainant must fail in this action upon the ground of laches?

The respondents may amend their answer on or before the September rules, by making any allegations proper to put in issue the matters of defense above stated, and the complainant may reply instant, or under the rules. Both parties are at liberty to take further testimony upon the points here indicated

John F. Dillon, J. B. Henderson, Geo. W. Kretzinger and N. A. Cowdrey, for respondents.

Luther S. Dixon and W. B. Felker, for complainant.

IOWA HOMESTEAD CO. v. DES MOINES NAVIGATION & RAILROAD CO. and others.

(*District of Iowa. June, 1881.*)

1. JURISDICTION — CONTROVERSY BETWEEN CITIZENS OF THE SAME STATE. — Whenever the sole controversy, in a suit begun in a state court, but subsequently removed to a federal court, is one between citizens of the same state, the suit will be remanded, upon motion, to the state court from which it was removed.

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2. **SAME — SAME.**— The parties to a suit brought in a state court to enforce a claim to a large amount of taxes which the complainant alleged it had paid in good faith, and under color of title, upon certain lands, were both citizens of the state in whose court the bill was filed. The bill prayed that the amount found to be due should be charged as a special lien upon the lands, and further prayed that the lands might be sold to satisfy the same. One Litchfield petitioned the court to be allowed to intervene in the cause, setting up the fact that he was the owner of the lands. His petition was granted; and thereupon, being a citizen of another state, he filed his petition and bond to remove the cause to a federal court. This petition also was granted, and the cause was removed. The complainant appeared, and moved that the cause be remanded. This motion was overruled. The complainant then moved to have the order denying the motion to remand set aside. This motion was also denied. Thereupon, at the suggestion of the court, he dismissed all that part of his bill praying that the amount found due should be charged as a special lien upon the land, and renewed his motion to remand. At this stage of the proceedings the intervenor asked and was allowed to file a cross-bill against the original parties to the suit, praying for a decree that the land be declared free and clear of any lien as prayed for by the complainant. A second motion of the complainant to remand was then denied. Subsequently the complainant, by leave of the court, presents an amendment to his bill, dismissing all claims whatever, except for a judgment against the respondent for the amount of the taxes, and the intervenor also presents an amendment to his cross-bill, alleging that by his contract with the respondent he has assumed all of said respondent's liability to the complainant for the taxes in question. The complainant once more asks that the cause be remanded. *Held*, that the federal court no longer has jurisdiction of the suit, as there is now no controversy here except between citizens of the same state. Motion to remand granted.
3. **SAME.**— It seems that, after the suggestion of the court to dismiss that part of the bill praying that the amount due, etc., had been followed, the court no longer had jurisdiction of the case, and the motion to remand, made at that stage of the proceedings, should have been granted, and the petition of the intervenor to file a cross-bill should have been denied.
4. **SAME — DUAL CONTROVERSIES — ONE BETWEEN CITIZENS OF THE SAME STATE UNITED IN SAME SUIT WITH AN ENTIRELY INDEPENDENT ONE BETWEEN CITIZENS OF DIFFERENT STATES — UNION OF, DUE IN NO WAY TO PLAINTIFF.**— Where the union of a controversy between citizens of the same state with an entirely independent one between the plaintiff and a third person, a citizen of a state other

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than that of the plaintiff, is due in no measure to the plaintiff, it seems that a federal court has no jurisdiction of the suit.

5. ACT OF 1875, § 2.—*Quære*, whether this conclusion could be come to, upon a true construction of the second section of the act of 1875, without regard to the provisions of the constitution.

The recent decision of *Barney v. Latham*, in the supreme court of the United States, distinguished.

The plaintiff, on the fifth day of January, 1877, filed its bill in the circuit court of Webster county, Iowa, to enforce its claim against said navigation company to a large amount of taxes which it had paid upon certain lands lying in that county, alleging that said taxes had been paid in good faith, under color of title, by virtue of a deed received by the plaintiff from the Dubuque & Sioux City Railway Company. The bill also, in addition to the accounting, sought to have the amount which should be found due charged as a special lien upon the lands, and prayed that the lands should be sold to satisfy the same. Afterwards, to wit, on the sixteenth day of July, 1877, Edwin C. Litchfield petitioned said court for leave to intervene in the cause, setting up as ground therefor that he was the owner of the lands sought to be subjected to the lien of the taxes, and was therefore interested in the suit.

On the seventeenth of July, 1877, the next day after filing the petition for leave to intervene, the court granted the petition, and thereupon Mr. Litchfield filed his petition and bond to remove the cause to this court, which was accordingly done, and the cause was docketed here August 10, 1877.

At the October term, 1878, the plaintiff appeared in this court and filed its motion to remand, which was overruled.

At the May term, 1879, the plaintiff moved to have the order of November 5, 1878, denying the motion to remand, set aside. This motion was also overruled; Mr. Justice Miller saying, however, that if the complainant would dismiss so much of his bill as sought to subject the lands claimed by Litchfield to the taxes, the motion to remand should be

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sustained. In accordance with the suggestion of the court, the complainant, at a subsequent time, dismissed so much of its bill as sought to subject the land to the payment of its claim, and at the same time moved to have the cause remanded. Pending this motion the defendant Litchfield applied for leave to file a cross-bill, which the court granted, and denied the complainant's motion to remand. Litchfield filed his cross-bill making the homestead and navigation companies defendants, and praying that his title to the lands be declared free and clear of any lien as claimed by the homestead company, and that the homestead company should be enjoined from claiming or in any manner asserting that the taxes paid by said company are a lien upon the lands. The plaintiff in the original bill, also by leave of the court, presents an amendment to his bill dismissing all claims whatever, except for a judgment against the navigation company for the amount of the taxes paid Litchfield; also presents an amendment to his cross-bill, alleging that, by his contract with the navigation company, he assumed all of said navigation company's liability to the complainant for the taxes in question.

George Crane, for plaintiff.

Wright, Gatch & Wright, for defendant Litchfield.

LOVE, *District Judge (giving the judgment of the court).*— Thus it appears that, after many vicissitudes, this cause is again before us upon a motion to remand. Mr. Justice Miller, in denying a former motion, said that if the plaintiff would dismiss his claim to a lien upon the land the cause should be remanded. This opinion must have proceeded upon the ground that upon the withdrawal of that claim by the plaintiff there would be no jurisdiction here. It could not have stood upon any other ground whatever, for upon no other ground than a want of jurisdiction could the cause have been remanded by the order of the court without the consent

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of the defendant Litchfield. The plaintiff accordingly withdrew or dismissed his claim to a lien upon the land. At that moment, according to Mr. Justice Miller's opinion, as we understand it, the jurisdiction failed here and the cause ought to have been remanded. But the defendant Litchfield, at this stage of the case, obtained from the court leave to file a cross-bill, by which he sought to make a new case, showing an interest other than that of defeating the lien asserted by the plaintiff. The writer of this opinion, Judge McCrary concurring, granted the order giving leave to file the cross-bill. We are both now, however, convinced upon further argument and fuller consideration, that the order granting leave to file the cross-bill ought to have been denied.

In the first place, if Mr. Justice Miller's opinion was correct, there was no jurisdiction after the withdrawal of the plaintiff's claim of lien; and how could there be any further proceeding in the cause without jurisdiction? The only thing to be done was then to remand the cause to the state court. But again the plaintiff dismissed a material part of his claim, upon the opinion and suggestion of the court that it would thereby entitle itself to an order remanding the cause. Having thus, at the suggestion of the court and in accordance with its opinion, abandoned its claim to a lien — the only claim that affected the defendant Litchfield,—it was certainly error for the court to allow Litchfield to set up a wholly new claim against it, and thus defeat its right to have the cause remanded — the only consideration upon which it dismissed its claim of lien. Considering the matter, therefore, in the light of Mr. Justice Miller's opinion alone, the court ought to have denied the application for leave to amend and file a cross-bill. The motion to remand ought to have been sustained upon the withdrawal of the claim of lien by the plaintiff; for there was then nothing whatever before the court but a controversy between two citizens of the state of Iowa. But we are of opinion that the same conclusion might be reached by a different course of reasoning. We incline to the opinion that the original motion to remand ought to have

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been sustained without any conditions whatever. What was the case? Let us assume that a suit was pending in the state court, in which there were two distinct and independent controversies — one between two citizens of Iowa, and the other between the plaintiff and a citizen of New York. Litchfield, the citizen of New York, was not a party to the original suit in the state court. No judgment which could have been rendered in that court could have affected him. If he had not voluntarily intervened, any judgment in that forum, affecting his title to the land, could have been questioned by him by an independent bill in equity in this court; but Litchfield did intervene in the state court, as he had a right to do under the state practice, and he thus by his own act brought his rights into question in the state court. Thus arose the double controversy in question. Mr. Litchfield then removed the suit with this dual controversy here, and the question is, was it competent for this court to overrule the motion to remand, and to hear and determine the controversy in the suit between two citizens of Iowa, as well as the controversy between the plaintiff, a citizen of Iowa, and the defendant Litchfield, a citizen of New York?

It is of no avail whatever to say that the defendant navigation company is insolvent, and therefore a mere nominal party, since Litchfield will be compelled to pay any sum that may be adjudged against the land. The plaintiff demands a personal judgment against the navigation company, and a party has a perfect right to judgment against his insolvent debtor, if he chooses to insist upon it. Moreover, a defendant who is insolvent to-day may become quite solvent in the future. Lastly, we have no evidence of the insolvency of the navigation company. It may turn out otherwise upon the proofs. The mere allegation of its insolvency does not establish the fact. If this question of jurisdiction were to be determined by the true construction of the second section of the act of 1875 alone, there might be room for grave doubt. The last clause of that section is as follows:

“And when in any suit mentioned in this section there

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shall be a controversy which is *wholly* between citizens of different states, *and which can be fully determined as between them*, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

But it must be borne in mind that upon every question of federal jurisdiction we are to consider not the law alone, nor the constitution alone, but the constitution *and* the law. These must concur in order to confer jurisdiction upon a federal tribunal. The constitution is the fountain of federal jurisdiction; the laws of congress are the streams through which the waters of jurisdiction flow to the courts; though the streams exist, yet, if the fountain be empty, the jurisdiction fails; and though the fountain be full, yet, if the streams exist not, the jurisdiction equally fails. The constitutional provision is that the judicial power shall extend to controversies between citizens of different states. This, as well by construction as by the very nature of our national constitution, excludes all controversies between citizens of the same state from the judicial cognizance of the federal courts. Clearly, then, we can have no jurisdiction of the controversy between the two citizens of Iowa in the present case. Standing alone and unconnected with the controversy between the plaintiff and Litchfield, there is a controversy in this suit between two citizens of different states. Does that fact give us jurisdiction to hear and determine a controversy between two citizens of Iowa of which otherwise we could have no jurisdiction whatever? Does the fact that a controversy between citizens of the same state is united in the same suit with a controversy between citizens of different states, bring the former controversy within our jurisdiction?

The whole course of legislation and of judicial decision hitherto has proceeded upon the principle that where in a suit a controversy between citizens of the same state is so

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blended with a controversy between citizens of different states as to be inseparable, the suit must remain in the state court. The reason is obvious. The state court is competent to decide both of such inseparable controversies and do full justice. The federal court is not competent to decide the controversy between the citizens of the same state, and therefore in such cases it can render only partial justice. In this view alone can that most anomalous, inconvenient, expensive and embarrassing provision of the act of 1866 be accounted for, whereby a suit in which there were two separable controversies might be divided—one part remaining in the state court and the other removed to the federal court. Why did congress provide that a suit in which there were inseparable controversies should not be removed? Because the federal court would have been incompetent to hear and determine the inseparable controversy between citizens of the same state. And if it had been supposed that, where the controversies in the same suit were separable, the federal court would be competent, under the constitution, to give judgment upon both controversies, would congress not have, in the act of 1866, provided that the whole suit should be removed, instead of only a part of it? Clearly, it seems to me, congress provided for splitting up the suit and removing a part of it for this reason and no other: that if the whole suit were transferred the federal court would be incompetent, under the constitution, to hear and determine the separable controversy between citizens of the same state.

If, then, it be not competent for a federal court under the constitution to hear and determine a controversy between citizens of the same state, when blended with and inseparable from a controversy between citizens of different states, how can it be possible, in view of the constitutional provision, for a federal court to have jurisdiction of a separate and distinct controversy between citizens of the same state, because it happens to be connected in the same suit with a controversy between citizens of different states?

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It is now settled that the whole suit must be removed under the act of 1875. A part of it cannot be transferred, leaving the remainder in the state court. Hence, if there be, as in this case, two distinct and separate controversies — one between citizens of the same state and the other between citizens of different states,— how is the federal court to deal with the controversy between the citizens of the same state? Can it give judgment between them without jurisdiction? Clearly it cannot split up the suit and remand it as to the controversy between the citizens of the same state, retaining it as to what remains? Can we dismiss, without prejudice, the suit so far as it relates to the controversy between citizens of the same state, and proceed to judgment upon the controversy between the citizens of different states? This would result, in a case like the present, in turning the plaintiff round to a new suit in the state court upon his controversy with the citizens of the state to which he belongs.

Now, where the plaintiff has selected his adversaries, made them defendants, this result, in the absence of any question of the statute of limitations, would impose no great hardship upon him. It would be no more than the inevitable result of his own misjudgment in joining unnecessarily, in one suit, two distinct and separable controversies — one between himself and a citizen of the same state with himself, and another between himself and a citizen of some other state. But in the case before us the solution of the difficulty suggested would work intolerable hardship to the plaintiff. He commenced his suit against a citizen of the same state with himself in the proper state court. He did not unite in this suit a controversy with a citizen of any different state. Nothing which might have been adjudged by the state court against the original defendant could possibly have affected the rights of Litchfield if he had not voluntarily appeared there. But if this court, by reason of Litchfield's voluntary intervention and removal of the cause, must, for want of jurisdiction and controversy between the plaintiff and the original defendant,

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dismiss the suit as to that controversy even without prejudice, turn the plaintiff round to a new suit in the state court, and proceed to judgment between the plaintiff and Litchfield, the latter, by his intervention, will accomplish a result without a parallel in judicial proceedings.

If, on the contrary, we proceed here to hear and determine the whole suit, we must pronounce judgment upon a separate, distinct and independent controversy between two citizens of the same state. But, if we remand the case, Litchfield need not be in the slightest degree prejudiced in his right to have his cause determined in this court. He will be at perfect liberty, as his counsel concedes, to withdraw from the state court; and most certainly, if any judgment should then be rendered in that court affecting his interests, he would have the right to come here, by direct suit, for relief. Finally, the plaintiff has, by amendment, expressly disclaimed any demand whatever against the defendant Litchfield, or the lands in which Litchfield is interested. There is, therefore, no real controversy here, except that which exists between the homestead and navigation companies, both citizens of Iowa.

I see no reason whatever, therefore, why the cause should not be remanded under the provision of the fifth section of the act of March 3, 1875, which provides that: "If in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear at any time after such suit has been brought or removed thereto that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of such circuit court, the said circuit court shall proceed no further therein, but shall dismiss or remand, as justice may require."

If we are to consider Litchfield's cross-bill with his proposed amendment, it seems to me that the reasons for remanding are imperative. He alleges that he has assumed to pay any sum that may be adjudged for taxes against the navigation company. If so, the controversy is one and in-

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separable. The plaintiff claims a personal judgment against the navigation company, and Litchfield, by his amendment, insists that he has a right to resist the obtaining of such a judgment, because if it be rendered he has assumed to pay it. This is the new case made by his last-proposed amendment. Can this be said to be a "controversy wholly between citizens of different states," within the terms of the second clause of the second section of the act of 1875? And can this controversy "be fully determined as between" Litchfield and the plaintiff without unavoidably involving a controversy with the navigation company? Litchfield's liability depends, by his own statement in the proposed amendment, upon the plaintiff's success in obtaining a judgment against the navigation company in his controversy with that company. How, then, can the controversy which Litchfield raises by this amendment be a "controversy *wholly*" between himself and the plaintiff, "citizens of different states?" And how can it be "fully determined" between them without involving the issue between the plaintiff and the navigation company, who are citizens of the same state?

Since writing the foregoing my attention has been called to the decision of the supreme court of the United States in the case of *Barney v. Latham*, just published in the Central Law Journal. It is, beyond question, held in that case, that where a plaintiff in the state court in one suit unites two distinct controversies — one with a citizen of his own state, and the other with citizens of other and different states,— the latter may have the cause removed. This case is clearly distinguishable from the one now before us by essential circumstances. The plaintiff in *Barney v. Latham* chose his own adversaries and brought them into court by proper service. He unnecessarily united in one suit controversies between himself and a citizen of the same state with controversies between himself and citizens of other states. These controversies, as the court holds, were distinct and independent. He could not, by so doing, deprive the non-

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resident defendants of their right to have their controversy determined in the federal court; and he could not complain if his cause of action against the resident defendant was dismissed. The supreme court does not point out distinctly what is to be done with the controversy between the plaintiff and the citizen of the same state with himself, but it may be inferred, I think, from the closing paragraphs of the opinion, that that controversy may be disposed of by some form of amendment to the pleadings, without any determination of it upon its merits. I see no reason why, in a case like that, the bill might not be dismissed as to the controversy between citizens of the same state. But, however this may be, our judgment in the present case is not affected by the decision in *Barney v. Latham*. Our order to remand stands upon special grounds, entirely sufficient, in our judgment, and wholly independent of the decision referred to. It is noticeable that the supreme court puts its decision in *Barney v. Latham* entirely upon the construction of the second clause of the second section of the act of March 3, 1875, without any reference to the constitutional difficulty. There may be no doubt about the construction of that clause, and yet the constitutional difficulty may remain. The decision seems to have been by a nearly equally divided court; the chief justice, Mr. Justice Miller, and Mr. Justice Field dissenting.

I am authorized to say that Judge McCrary concurs in the conclusion reached in the foregoing opinion. He has not seen the opinion, and is not responsible for any of its reasonings.

NOTE.—See *Blake v. McKim*, 103 U. S. 336.

United States v. Spiel, Adm'r, etc.

UNITED STATES v. SPIEL, Adm'r, etc.

(District of Minnesota. August, 1881.)

1. **STATUTES OF LIMITATIONS.**— State statutes of limitations do not run against claims of the United States.
2. **GEN. ST. MINN. CH. 77, § 1, AND CH. 53, § 19 — JOINT JUDGMENTS.**— By chapters 77, § 1, and 53, § 19, Gen. St. Minn., a joint judgment against the deceased and others, obtained during his life-time, may, upon his death, be prosecuted against his representative alone.

Demurrer to complaint.

NELSON, *District Judge.*— This suit is brought upon a judgment obtained against David Rohrer, administrator of the estate of Henry Tilden, deceased, J. C. Ramsey, Benjamin F. Hoyt, Louis Roberts, James McBoal, D. F. Brawley, David L. Fuller, and B. W. Brunson, January 5, 1857. The administrator of J. C. Ramsey alone is now sued, and a demurrer is interposed by him to the complaint. The questions in the case raised on the demurrer are whether the action can be maintained against the representative of the deceased debtor alone; and further, is the action barred by the statutes of Minnesota limiting the time when actions upon judgments can be brought to ten years? The judgment was rendered against all the parties above named, and in the complaint appears to be a joint one. In my opinion (1) the statute of limitations of the state of Minnesota does not run against the United States whether the claim rests in judgment or not; (2) by the common law, on the death of Ramsey the suit upon the judgment could be brought only against the survivors.

By the statutes of Minnesota (see chapter 77, § 1, and chapter 53, § 19, Gen. St. Minn.) the estate of Ramsey is liable; and, although the judgment is joint, the liability is the same as if the judgment had been against him alone. Again, the judgment against the administrator of Ramsey would be *de bonis testatoris*, while against the surviving

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joint debtors it should be *de bonis propriis*. It would seem to follow, then, that the action must be brought against the administrator of Ramsey separately, and he cannot be joined with the surviving obligors. It is unnecessary, however, to go to this extent to sustain the complaint in this action, for the liability of the estate is fixed by the statute.

Demurrer overruled, with leave to answer in twenty days.

H. F. Masterson, for demurrer.

W. W. Billson, U. S. Attorney, *contra*.

MARTINDALE v. WAAS and another.

(*District of Minnesota. September, 1881.*)

1. **CONTRACTS — TIME NOT OF THE ESSENCE.**— Time is not of the essence of a contract to convey real estate, in the absence of any express provision.
2. **SAME — CONCURRENT CONDITIONS.**— When, in an agreement for the sale of real estate, the same day has been fixed for the payment of the money and the delivery of the deed, the two sides of the contract will be mutual and concurrent conditions.
3. **SAME — TENDER OF PERFORMANCE.**— The expression of a willingness to give a deed is not a sufficient tender of performance where the agreement was to give a deed and also assign an interest in a lease.

Suit brought to enforce specific performance of a contract for the sale of real estate.

A. F. Scott, for complainant.

A. F. Foster, for defendants.

NELSON, District Judge.— The defendants, on January 23, 1880, entered into a written contract for the conveyance to complainant of the south half of a lot, designated on the government plat as lot No. 7, in the W. half of section 5, township 28, range 23, together with water rights, etc.

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John Waas negotiated the sale. The land was supposed to contain 18.25 acres, and the complainant agreed to pay \$121.92 per acre. The defendants were to have the land surveyed, and proper monuments placed, so as to show the quantity sold, and a suitable plat or map made and a copy furnished the complainant, and the quantity of land shown by the survey was to be paid for, whether more or less than 18.25 acres.

The defendants also agreed that their two daughters should execute to complainant a quit-claim deed of the premises sold, containing a grant of right of way for public streets or avenues running northerly and southerly through the north and south half of said lot, as the complainant might desire. They also agreed to assign over to the complainant 67-150, the share in a lease given to one Hans Johnson, of the premises sold, with adjoining lands, in which lease Johnson agreed to pay a rental of \$150 per annum. The complainant paid \$100 down on January 23d, when the contract was executed, and the balance was to be paid on February 6, 1880, upon the fulfillment, by defendants, of the provisions which were agreed to, and the execution and delivery of the deed, which was to be done at the same time, at the complainant's residence in Minneapolis. The conveyance was to be a full covenant warranty deed, and the defendants stipulated and agreed that the title should be free and clear from all incumbrances. At the time the contract was executed the land had been sold on foreclosure for default of an installment of interest on a mortgage, and the time for redemption expired February 20, 1880, but the defendants paid the installment before the time expired.

The land was surveyed and platted, and found to contain 17.82 acres. The daughters of the defendants were absent from home until after the sixth of February, and had previously refused, as testified to by their father, to sign any papers, and it was mutually agreed to await their arrival. There is a conflict of testimony whether it was the fifth or

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seventh of February when it was so agreed, but the date is immaterial in the view taken by the court. There were one or more interviews between John Waas and the complainant, either on the streets of Minneapolis, at the complainant's residence, or in John Waas' office, about the delivery of a deed from the daughters, who still refused to execute it. On the thirteenth of February John Waas visited the complainant's house. There is a conflict in the testimony as to what occurred at that interview. John Waas testifies that he offered to give a warranty deed of the land, and that was all he could give and the only way to settle it. He admits that he had no deed with him, and none had been executed, but he says one was ready to be drawn, and his wife was ready to sign it. The complainant's testimony is that Waas told him that he would bring such a deed, and also a quit-claim deed to the city for streets, etc., and that he, the complainant, told Waas that he must fulfill his contract without further delay. The difference in the testimony is not important.

There was another interview on the nineteenth or twentieth of February in Waas' office. At that time Mrs. Meader was present, who held a mortgage on the land given by Waas and wife. This appointment must have been made with a view to close up the business, and the testimony of the complainant to that effect is not denied by Waas, and is corroborated by Mrs. Meader. At that time Waas offered to give a warranty deed, but the complainant declined to accept such a deed in satisfaction, and was anxious about the right of way for streets. After some conversation and suggestions, it was thought the daughters would make a deed to their father. The amount due Mrs. Meader on her mortgage was computed, and she was present expecting payment, and when Waas thought his daughters would execute the deed for streets, etc., to himself, the parties separated to finish the business, and Waas and Mrs. Meader went to Jackson's office to have him draw a satisfaction piece and

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quit-claim deed. When the interview at the office of Wass closed, he said he would notify the complainant to go to the court-house when he was ready. The complainant was not notified, and no other interview took place until some time in March, when Mrs. Meader commenced a foreclosure suit, making the complainant a party; and about that time John Waas testifies, and it is not denied by any one, that he went to complainant, and, to use his own language: "I told him (complainant) I had offered him a clear warranty deed for the south half of lot 7, and he had refused to accept it, and the time had passed for the redemption of the land and I rescinded the contract on authority from my wife."

On April 10th and 22d complainant made a tender of the money and demanded a warranty deed, and stated that he waived his right to streets. The tender included interest on the amount due from February 6, 1880, less the \$100 paid down on the execution of the contract. The defendants refused to perform, and the suit was instituted in the district court of Hennepin county and removed to this court.

The suit brought by Mrs. Meader resulted in a decree of foreclosure, and the complainant was purchaser at the sale.

CONCLUSIONS.

1. Time is not the essence of this contract. The covenants are mutual and concurrent, and Waas and wife could not claim payment without a tender of performance. The agreement to procure a deed for streets, so that the complainant might have right of way through land owned by the daughters, does not prevent a court of equity from enforcing a performance of the substantial part of the contract, which defendants are able to perform. The substantial part of the contract was the bargain and sale of the land and assignment of a part of the Hans Johnson lease; and if any damage resulted from the fact that the defendants could not procure a deed for right of way, etc., from their daughters, there is ample power in a court of equity to do justice by way of decreeing compensation to the complainant.

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2. There was no sufficient tender of performance by defendants which would require the complainant to fulfill on his part. They had agreed to give a warranty deed of the land and an assignment of an interest in the lease, and there never was anything more done than a willingness expressed by Waas to give a deed. He never, at any interview, offered to assign the part interest in the lease as agreed upon.

3. The fact that the complainant was ready to pay for eighteen acres, when only 17.82 acres was the measurement, does not change the contract. All that the complainant could claim the deed should give him was 17.82 acres, and there is not sufficient proof of any change in the contract, except an extension of the time for payment.

4. The evidence is clear that complainant made a tender of the balance of the purchase price on April 10th to Waas, and on the twenty-second to Mrs. Waas, and demanded a deed from them, waiving all claim to the deed from the daughters. The tender to John Waas was sufficient. He negotiated the sale and was the agent of his wife, as is established by the evidence.

5. There is no evidence that any damage is sustained by failure of the daughters to deed the right of way for streets, and none can be recovered. In fact the complainant waived all his rights thereto.

6. While *gross* inadequacy of consideration may justify a court of equity in refusing to enforce the performance of a contract, there is not such inadequacy of consideration in this case. The value of the land is claimed by the defendants to have been \$150 per acre at the time the contract of sale was made, and the price to be paid was \$121.92.

7. There was no effective rescission of the contract by the defendants and no right to rescind.

8. The complainant, by his purchase at the foreclosure sale, is entitled to have the amount paid by him offset *pro tanto* in liquidation of the balance due the defendants under the contract. A reference is ordered to H. E. Mann, as master, to ascertain the balance due defendants after the complainant

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is credited with this amount, and the costs of this suit, which shall also be ascertained by said master; and upon the coming in and confirmation of said master's report, a decree will be entered directing and requiring the defendants to execute a deed to complainant for the 17.82 acres described by metes and bounds as platted, and also an assignment of the lease, as required by said written contract, on payment of the balance found due by the master; and it shall provide that if the defendants do not, immediately after the balance is ascertained as aforesaid, make and tender such conveyance, the decree shall stand for a deed, when signed and entered, upon payment into the registry of this court of the balance so found due the defendants.

UNITED STATES v. RANKIN.

(Eastern District of Missouri. October, 1881.)

1. LEGACY TAX—BEQUEST OF AN ALIEN NON-RESIDENT TO ALIEN NON-RESIDENTS FOR LIFE, WITH REMAINDER TO RESIDENTS AND NON-RESIDENTS OF THE UNITED STATES—ACTS OF CONGRESS CONSTRUED—EFFECT OF REPEALING ACT OF JULY 14, 1870.—An alien non-resident died in Ireland, July 18, 1870. By her will she bequeathed property, situated partly in Ireland and partly in Missouri, to A. and B., who were also alien non-residents, for the life of A., with remainder to alien non-residents and two resident citizens of the United States. Her will was probated in Ireland, and ancillary letters of administration were granted in Missouri, November 2, 1870. On October 18, 1877, A. and B. conveyed their interests to the remaindermen. At the time of the conveyance, the portion of the estate situate in Missouri was still in the American executor's hands. Suit being brought to recover a legacy tax upon the estate in his hands, it was *held* that, under the acts of congress prior to the repealing act of 1870, the taxes would not have accrued, if at all, until the beneficiaries entered into possession or enjoyment of the property, and that as said legatees did not enter into possession or enjoyment of their legacies before 1877, the property then in said executor's hands was exempted by the repealing act of 1870 from the legacy tax imposed by the vari-

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ous prior acts. Whether or not the interests derived by either the foreign or American legatees as remaindermen were, under the facts stated, subject to a legacy tax, *quære*.

This is an action of debt for legacy tax. The facts, as set forth in the petition, are as follows:

On the eighteenth of July, 1870, Ann Orr Rankin, a subject and resident of Great Britain, who had never resided in the United States, died, testate, in Ireland. At the date of her death she owned real estate and personal estate both in Ireland and the United States. The latter property, situate in St. Louis, had been long held and managed by her agent in said city.

By her will she left to her mother and sister, in equal shares, all the income of her estate during the natural life of the mother, and, at the death of the mother, one-half to go to her brother Robert, and the other half to be divided in seven parts, distributable as in the will stated. The will named her three brothers executors. Said will was probated in Ireland, where twenty-four twenty-eighths of said estate, situate in that country, were distributed. On November 2, 1870, said will was probated in St. Louis and letters testamentary granted, and such proceedings had thereunder that the defendant became sole executor in charge of the estate. On October 13, 1877, the life-tenants conveyed their interest to the remaindermen. From the death of the testatrix (1870) to the date of said conveyance (1877), said executor paid to said mother and sister in Ireland, as income derived from the personal property in St. Louis, the sum of \$30,218.93, which sum was the value of said estate in the hands of the executor. All of the remaindermen who purchased the life-estate aforesaid, except two, were citizens and residents of Great Britain, and one of the two, Robert, conveyed his interest (*when* is not alleged) to a brother and sister, not citizens or residents of the United States. In due course of administration the St. Louis probate court ordered final distribution of the legacies, and, in accordance with the foregoing rights, to be paid

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by this defendant as executor. The petition sets out in detail what sums the executor, pursuant to said order, paid to the respective parties, etc. Although the date of said order and of said payment is not stated, yet it is understood it was subsequent to 1877.

A demurrer to the petition is interposed, and has been fully argued.

Bliss, Drummond & Smith, for the United States.

G. M. Stewart, for defendant.

TREAT, *District Judge*.—On the foregoing statement of facts several intricate propositions arise, under the revenue laws of the United States, concerning some of which decisions have been made apparently in conflict with each other.

Prior to the repealing act of July 14, 1870, the several United States statutes, concerning succession and legacy taxes, provided that executors, etc., as to legacies or distributive shares from personal property, should be made subject to the duty or tax prescribed, when said property passed: "From any person possessed of such property, either by will or by the intestate laws of any state or territory, or any personal property or interest therein, transferred by deed, etc., made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor," etc.

The first contention is as to the terms of the statute concerning foreign wills. The United States contends that the clause of the statute above quoted should be interpreted to mean that any legacy under a will, wherever made, is subject to a legacy tax, if the legacy inures to the benefit of an American citizen, and he receives the same; and that the other words, "or by the intestate laws of any state or territory," are not restrictive as to wills. There is no adequate reason, it is urged, why an American citizen, receiving a legacy through a foreign will, should not pay a legacy tax when

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he would be subject thereto if the legacy was through a domestic will. To this argument may be suggested that the same reason would prevail with respect to intestate estates. The law of the domicile prevails as to personalty, whether the decedent is testate or intestate; yet the same clause of the statute limits the liability of the executor, in cases of intestacy, to the transmission of property by the laws of the state or territory. Why should not property, passing by laws of descent in a foreign country to an American citizen, be subject to tax as well as if passing by will? Is there, in the language of the statute, any distinction to be drawn between a foreign legacy and a foreign distribution of an intestate estate, or are the terms used in the same sentence to be interpreted as covering the same ground?

There are other provisions of the statute that shed light on the subject. The executor was required to make his returns and pay the tax to the collector of the district where the decedent resided. The decedent in this case resided in Ireland, and never was in the United States. Consequently, the executor's return and payment could not be made in accordance with law to any United States collector.

Without expressly passing upon this point, but intimating merely that the statute does not cover a case like the present, it is important to consider the effect of the repealing act of July 14, 1870. That act repealed the succession and legacy taxes, with this saving proviso: "That all the provisions of said [repealed] acts shall continue in full force for levying and collecting all taxes properly assessed, or liable to be assessed, or accruing under the provisions of the former acts or drawbacks, the right to which has already accrued, or which may hereafter accrue, under said acts," etc.

Without entering upon the nice distinctions between successions and legacies, it must suffice that the taxes chargeable were, under the statutes, due and payable when the beneficiary entered into the possession or enjoyment of the

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property, and not before. It is obvious that the value of the succession or legacy could not be determined until the right of possession accrued.

In the case of *May v. Slack*, 16 Int. Rev. 134, it was held that, in the case of a pecuniary legacy, the tax "accrued" immediately on the death of the testator, although not due and payable until a subsequent period, and consequently the legatee was liable despite the repealing statute. So far as disclosed, that was a case of immediate bequest, subject only by operation of law to the usual course of administration,—a case different from that under consideration in this: that here the American legatees were to have possession only after the determination of a life estate

In the case of *Clapp v. Mason*, 94 U. S. 589, the foregoing case of *May v. Slack* was summarily disposed of, with the remark that it has no bearing on the question then considered. Why not? The repealing act pertained to legacies and successions. True, as to successions, there are some provisions not applicable to legacies; yet the main fact is common to both, viz., that the taxes were not due and payable until the beneficiary entered into possession or enjoyment. The United States supreme court said: "It is manifest that the right does not accrue until the duty can be demanded; that is, when it is made payable." Hence it was held in that case that as the remaindermen did not enter into possession until 1872, after the determination of a life estate created in 1867, no succession tax accrued before the repealing act.

In the case now before the court the remaindermen and their representatives did not, as legatees, come into possession or enjoyment of the legacies until 1877, on the extinguishment of the life estate. The exception in the repealing act is clear and significant. No taxes had been nor could lawfully be assessed on these legacies prior to August or October, 1870, for the legacies were not then due and payable, nor were they liable to be assessed. Certainly the

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taxes had not accrued, for no possession or enjoyment accrued until 1877.

The case of *Clapp v. Mason* seems to have been decisive of the question as to successions, and, by parity of reasoning, as to legacies also. But in the case of *Mason v. Sargent*, 23 Int. Rev. Rec. 155, the United States circuit court for Massachusetts held otherwise. That ruling was made before the decision of the United States supreme court was known, and followed the case of *May v. Slack*. The case of *U. S. v. Hellman*, 23 Int. Rev. Rec. 387, refers to *Clapp v. Mason*, and, for reasons given, follows *Mason v. Sargent*.

Which line of reasoning or construction is the more cogent—that of the United States supreme court, or of the two circuit courts? If the United States supreme court had passed directly upon the point, its views would be conclusive; but every argument by it, with respect to a succession tax, applies with equal, if not greater, force to a legacy tax. Take the case at bar for illustration. An alien non-resident bequeathed in 1870 her estate, situate mostly in Ireland, to her mother and sister for life, with remainder to several others, some of whom were alien non-residents, and only two citizens and residents of the United States. A very small portion of her estate was situate in this country, where ancillary administration was had. None of the remaindermen, alien or resident, could come into possession or enjoyment of the expectant estate until the life estates disappeared. What the value of the estate would then be could not be previously ascertained, nor were the taxes thereon, in any event, due and payable until the life estates ceased. The legatees were citizens and aliens, and the executor here was ordered to distribute the personal estate to said citizens and aliens accordingly. Was he to pay a legacy or succession tax on the distributive shares going to non-resident aliens? It should be taken for granted that, as to the share of Robert, who was a resident citizen of this country, it could not es-

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cape the tax, although bought by his alien kinsmen, if the same were taxable in 1877.

The various provisions of the revenue acts incline me to the opinion that the interests derived by the American legatees, as remaindermen, under the facts stated, were not subject to a legacy tax. But, whether that be so or not, I must hold that the repealing act of 1870 exempted the defendant, and the property in his hands, in 1877, from the legacy tax imposed by the various acts prior to 1870. The demurrer is sustained.

LICHTENAUER, Assignee, v. CHENEY and others.

(*District of Minnesota. September, 1881.*)

1. BANKRUPTCY — EQUITY PRACTICE — AMENDMENTS UNDER EQUITY RULE 29.— Amendments, regularly made under equity rule 29, cannot be avoided by a motion to strike from the record, or set aside, the order allowing them.
2. EQUITY PLEADING.— *Semble* that a bill to set aside a conveyance by the bankrupt, on the ground of fraud, is demurrable in the absence of any allegation that the fraud was discovered within the time prescribed by the statute.

NELSON, *District Judge*.— On June 13, 1881, an order was obtained, on motion, giving the complainant leave to amend his bill on file in certain respects; among others, so as to make the Exchange Bank of Canada a party defendant. The order was granted under equity rule 29, the first paragraph of which reads: "After an answer, plea or demurrer is put in, and before replication, the plaintiff may, upon motion or petition, *without notice*, obtain an order from any judge of the court to amend his bill of complaint on or before the next rule-day," etc.

The bill was regularly amended by the complainant within the time specified, and the amendments served as the order provided. A motion is now made by the solicitors, who ap-

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pear for the Exchange Bank of Canada, to strike from the record the order, or set it aside, so as to get rid of the amendments. The bill, being properly amended, according to the equity practice, must stand, and the defendants are required to answer, file a plea, or demur thereto.

It is not possible to get rid of the amendments regularly made by a motion to have the order under rule 29 set aside. The complainant is entitled under this rule to thus amend his bill of complaint, and the motion must be denied.

This decision does not meet the question which is urged upon the court by the defendant's solicitor, viz.: that suit against the bank is barred by the limitation in the last clause of section 5057, Rev. St. (section 2, bankrupt act).

If a demurrer is interposed, the bill as now framed against the bank would be dismissed for the reason that, conceding every statement in the amendment true with reference to a secret fraud of the Exchange Bank of Canada, there is no allegation that it was discovered within the time allowed by the statute of limitations to avoid the bar.

The solicitors for the complainant urge that the allegation that the bank "now claims some interest," etc., is sufficient, the amendment being allowed June 13, 1881; but *non constat* that the complainant only discovered the alleged fraud at that time.

If the complainant amends the bill in this respect, and a demurrer is interposed, I will hear further argument, if desired, on the bar of the statute.

W. P. Warner and Hiram F. Stevens, for complainant.

J. B. & W. H. Sanborn, for defendant bank.

Seay v. Wilson, Assignee.

SEAY v. WILSON, Assignee.

(*Eastern Division, Western District of Missouri. December, 1881.*)

1. APPLICATION OF PAYMENT — EQUITABLE RULE.— Where three parties each held a judgment which was a lien upon the real estate of the same judgment debtor, entitled to share *pro rata* in the proceeds of the sale of said real estate, and where, by agreement between them, one of the three agreed to release his lien in consideration of the sum of \$450, which was paid to him by the other two: *Held*, that this was an enforcement of the judgment lien so released, to the extent of the sum paid for said release, to wit, \$450, and that said judgment should be credited with that sum; and that an agreement between the three lien holders, that said sum should be credited upon a junior judgment against the same judgment debtor, was void.
2. SAME — BANKRUPTCY — RIGHT OF ASSIGNEE IN EQUITY TO INSIST UPON SUCH APPLICATION.— Where a creditor of a bankrupt has a lien upon the property of a third party as part of his security for a judgment against the bankrupt, he cannot release that lien for a consideration, without crediting such consideration on the claim against the bankrupt estate; and the fact that such a creditor had a second unsecured claim against such third party does not alter the case.
3. JUDGMENT IN SCIRE FACIAS — EFFECT OF, UPON PARTIES TO ORIGINAL SUIT.— The main purpose of proceedings in *scire facias* under the statute of Missouri is to revive the judgment and thereby preserve the lien thereof upon real estate; and where a bankrupt was a party to the original judgment, his assignee in bankruptcy is not estopped by a judgment in *scire facias*, to insist that the judgment revived had been in part satisfied, especially in a case where he had no knowledge or notice of such partial satisfaction at the time that the judgment was revived, and could not by reasonable diligence have ascertained that fact.

McCRARY, *Circuit Judge*.— The controversy in this case relates chiefly to the amount which should be allowed appellant upon a judgment in his favor and against the bankrupt and one Hawkins, rendered in the circuit court of Phelps county, Missouri. That judgment was upon a note executed by the bankrupt as principal and Hawkins as surety, and the judgment was against both. Hawkins died insolvent, leaving assets enough to pay a portion only of his indebtedness. The judgment above mentioned in favor of the appellant,

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Seay, was a lien upon certain real estate of Hawkins, deceased, as were also two other judgments, one in favor of one Love, and the other in favor of one Branson.

The appellant also held another and a subsequent judgment against Hawkins, deceased. Certain real estate of the estate of Hawkins having been sold, and the proceeds being in the hands of the administrator for distribution, it was agreed between appellant, Love and Branson, all being judgment creditors of Hawkins, and entitled to share *pro rata* in such distribution, that appellant should receive \$450 as his full share of said proceeds, and the remainder should be divided between Love and Branson. In pursuance of this agreement, the said sum of \$450 was paid to appellant and by him credited upon his junior judgment against the Hawkins estate, and not upon the prior judgment against the bankrupt and the Hawkins estate.

The district court held that the application of this payment of \$450 to the satisfaction of the junior judgment was improper, and that the same was, in equity, a payment upon the judgment against the bankrupt, and should be credited accordingly. This ruling is assigned as error. It is said that the payment was not made by the bankrupt, nor by the assignee, nor by any one for them, or either of them. This must be admitted, but the admission does not dispose of the question. It is equally true that the payment was not made by the administrator of Hawkins, nor out of the assets of his estate. If, under the peculiar circumstances of this case, we were to adhere to the rule that the money paid must be applied on the debt of the party making the payment, we should meet the same difficulty, whether we sought to apply it on the judgment against the bankrupt or on that against the Hawkins estate. We must, therefore, look for some other rule for our guidance. The money was paid by Branson and Love, who were not liable upon either judgment. The payment was, therefore, not made by them because of any personal liability on the part of either of them. Why,

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then, did they pay it? Evidently for the reason that the judgment of appellant against the bankrupt was a lien upon the proceeds of the sale of the Hawkins land on a par with their own judgments, and the appellant was, therefore, entitled to share with them in those proceeds. While, therefore, the payment was not made in a strict and technical sense *upon* the judgment against the bankrupt, it was clearly made *because* of that judgment and on account of the fact that it was a lien. Of course, if appellant had held no judgment against Hawkins except the one which was junior to those of Branson and Love, they would have paid nothing. It was the existence and priority of the judgment against the bankrupt and the Hawkins estate that made the payment necessary. The appellant used that judgment to enforce payment, and having done so, undertook to apply the payment, when so made, upon another and junior judgment which could not have been used to secure or enforce the payment.

This is not a case for the application of the rule that, where a debtor pays a sum of money to his creditor, the two may agree that it shall be applied to either of several debts. The relation of debtor and creditor did not exist between appellant and Branson and Love. These three parties, Seay, Branson and Love, each held a judgment which was entitled to share in the fund raised by the sale of the Hawkins estate. The two latter paid the former \$450 to release his claim under his judgment against said fund. This amounted to an enforcement of his judgment lien against said fund to that extent. The appellant cannot, as against the other creditors of the bankrupt, be placed in a better position than he would have occupied if he had made no bargain with Branson and Love, and had insisted upon and received the share in the fund to which his judgment entitled him; and if he had done that, no one will question that it would have been his duty to credit what he received on the claim which was enforced, to wit: the judgment against the bankrupt.

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By a sort of indirect or circuitous arrangement with other lien holders, he has, in effect, enforced his judgment lien to the extent of \$450. The assignee of the bankrupt, acting for the creditors, has a right to insist that the credit shall be entered just as if the enforcement of the lien had been direct instead of indirect. The rule, then, by which we are to be guided may be stated as follows: Where a creditor of a bankrupt has a lien upon the property of a third party as part of his security for his debt against the bankrupt, he cannot release that lien for a consideration without crediting such consideration on the claim against the bankrupt estate. If he could do so, he might thereby secure more than his due by releasing his lien against the third party for a price paid, and afterwards enforcing his entire claim against the bankrupt estate. The fact that the appellant had a second unsecured claim against the Hawkins estate does not alter the case. It was the prior lien that was indirectly enforced, and the release of the junior judgment was not thought of, and of course no such release could form a part of the consideration for the payment of the money. It follows that the application of the payment to the satisfaction of the junior judgment was void.

It is insisted that the assignee is estopped to claim credit for the payment in question because subsequently thereto the judgment was revived in a proceeding in *scire facias* in the state circuit court in a cause to which the assignee was a party. The fact of the payment was unknown to the assignee at the time the *scire facias* proceeding was pending, and, of course, it was not litigated. The main purpose of proceedings in *scire facias*, under the statute of Missouri, is to revive the judgment and thereby to preserve the lien thereof upon real estate. Revised Statutes of Missouri, sections 2732 to 2738. Whatever the effect of a judgment of revival in such a proceeding may be in ordinary cases upon the parties to the original judgment, I am clearly of the opinion that an assignee in bankruptcy is not thereby estopped to insist that

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the judgment revived had been in part satisfied, especially in a case like the present, where he had no knowledge or notice of such part satisfaction at the time that the judgment was revived. Neither the judgment debtor (the bankrupt) nor his assignee had anything to do with the payment, and it is difficult to see upon what principle it can be held that the latter was bound to ascertain the fact and set it up in that case. To require this would be to impose upon him not merely the duty of exercising due diligence, but much more.

The appellant alone, of all the parties to that suit, knew of the payment, and it was his interest to keep it secret, or, at least, to make it appear to be a payment upon the subsequent judgment. It would have been next to impossible for the assignee to discover the fact, there being nothing to put him upon inquiry. It may be conceded that where, in a proceeding in a state court to revive a judgment against a bankrupt, the question of a payment is raised and litigated between the plaintiff in such judgment and the assignee in bankruptcy, the federal court in bankruptcy is bound by the judgment, though this may be doubtful. No such case is presented here. The question of payment was not raised and was, of course, not decided; and for reasons already stated, I hold that it was not the duty of the assignee to raise it in that case.

I find no error in the judgment of the district court, and the same is accordingly affirmed.

L. F. Parker, for appellant.

B. B. Kingsbury, for appellee.

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HANNON, Executor, v. SOMMER.

(District of Kansas. June, 1881.)

1. **HOMESTEAD — ALIENATION — RIGHTS OF WIFE — MORTGAGE.**— Under the constitution and statutes of Kansas, the homestead cannot be alienated without the joint consent of husband and wife, when that relation exists, and a mortgage executed by the one without the concurrence of the other is void.
2. **SAME — MORTGAGE BY HUSBAND AFTER DEATH OF THE WIFE — RIGHTS OF MINOR CHILDREN.**— The minor children have the right to use and occupy the homestead after the death of one of the parents, and this right cannot be interfered with by a mortgagee who claims under a mortgage executed by the husband and father; but, subject to this right in the minor children, the husband may, after the death of the wife, execute a valid mortgage upon the undivided half of the property occupied as a homestead, and the title to which was vested in the wife at the time of her death. Under the statute of Kansas, the husband inherits one-half of the estate of which the wife died seized.
3. **SAME — RIGHT OF FORECLOSURE.**— After default, the mortgagee is entitled to a foreclosure of the mortgage upon the undivided half of the homestead, and to have a decree for a sale of the same, subject, however, to the right of occupancy of the whole of the premises by the minor children, whose rights are not to be affected by the mortgage, decree or sale.

This is a bill to foreclose a mortgage executed by respondent to Ambrose L. Van Dusen, who has since deceased. The property mortgaged (one hundred and sixty acres of land) was, at the time of the execution of the mortgage, and for a long time prior thereto, occupied as a homestead by respondent and his minor children. The wife of respondent died in May, 1876, seized in fee of the premises, and being then, with her husband and children, in possession and occupying the same as a homestead. By the law of this state, the title passed at the death of the wife, by descent, to the respondent and his children, one undivided half to him and the same to them jointly. The mortgage sued on was executed by respondent on the first of January, 1876, over a year after the

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death of the wife, and after he had acquired title to the undivided half of the property by inheritance from her.

There are a number of minor children in possession of the property, but they are not made parties to this suit. The case was heard before Judge Dillon at the June term, 1879, but not decided, the judge directing a reargument upon the following questions:

First. Is the mortgage void because the husband had no power to execute it?

Second. If so, is the plaintiff entitled to a decree of foreclosure while the husband remains unmarried and the children are minors?

This reargument has now been had.

Mahan & Burton, for complainant.

Hoffman & Pierce, for respondent.

McCRAHY, Circuit Judge.—The constitution of the state of Kansas provides as follows (art. 15, sec. 9):

“A homestead to the extent of one hundred and sixty acres of farming land, or of one acre within the limits of an incorporated town or city, occupied as residence by the family of the owner, together with all the improvements on the same, shall be exempted from forced sale, under any process of law, and shall not be alienated without the joint consent of husband and wife, when that relation exists; but no property shall be exempt from sale for taxes, or for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon, provided the provisions of this section shall not apply to any process of law obtained by virtue of a lien given by consent of both husband and wife.”

Substantially the same provision is embodied in the statutes of Kansas, chap. 38, sec. 1.

It is, of course, very clear that, under these provisions, the homestead cannot be alienated without the joint consent of

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husband and wife, when that relation exists, and a mortgage executed by one without the consent of the other would be void; but the question here is, whether a mortgage upon such homestead is equally void if executed by the husband alone after the death of the wife. That the minor children have a right to the use and occupancy of the homestead, and that this right cannot be interfered with by the mortgagee, or any one claiming under him, whether through a foreclosure sale or otherwise, seems to be conceded. The only question is as to the right of complainant to a decree for the sale of the undivided half of the premises, subject to the right of the minor heirs to the use and occupancy of the premises, whatever the extent of that right may be.

It is the settled law of Kansas that the homestead may be alienated by the joint deed of husband and wife; and also, that in the case of the death of either, the survivor may subsequently alienate his or her interest, subject to the right of occupancy of the premises as a homestead by any member of the family entitled to such occupancy, and not joining in the conveyance. *Dayton v. Donart*, 22 Kan. 256; *Catton v. Talley*, 22 Kan. 698.

The respondent, therefore, might have sold, by deed absolute and unconditional, all his interest in the premises at the time he executed the mortgage, and the sale would have been valid, as against all the world, except the children, whose right under the homestead law would have remained the same precisely as if no sale had been made. It is well settled as a general rule, that any interest in lands which is the subject of contract or sale may be mortgaged. 2 Story, Eq. Jur. sec. 1021; *Miller v. Lepton*, 6 Blackf. (Ind.) 238.

But it is insisted by counsel for respondent that the constitutional provision above quoted constitutes an exception to the general doctrine on this subject, because it declares that the homestead "occupied as a residence by the family of the owner, together with all of the improvements on the same, shall be exempted from forced sale under any process of

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law," except for taxes, for purchase money, or by virtue of a lien given by the consent of both husband and wife. This clause must be construed in connection with the remainder of the sentence, which declares that the homestead "shall not be alienated without the joint consent of both husband and wife, when that relation exists." This provision necessarily implies that the homestead may be alienated by its owner if the relation of husband and wife does not exist; and if it can be alienated absolutely, it can be mortgaged.

If it can be mortgaged, the mortgage can be foreclosed, and the equity of the mortgagor, whatever it is, may be sold. The constitutional provision was intended to protect the right of the wife and children in the homestead by exempting it from sale for debt, and requiring a sale or mortgage to be made by both husband and wife, when that relation exists. It did not provide for the case of a homestead held by a husband after the wife's death. The words "forced sale," employed in the above provision of the constitution, should, we think, be held to mean sales upon execution or other process for the collection of the ordinary debts of the owner, and not to a sale made for the enforcement of a mortgage which the owner had the right to execute, and which the holder has the right to foreclose. This construction preserves all the homestead rights of the heirs. It would be no advantage to them to require complainant to wait for his decree until their right of occupancy and use had ceased; nor can it do any harm to sell at once the interest of the mortgagor, subject to their rights. The purpose of the constitutional provision—to protect the homestead rights of the family—is accomplished by such a decree.

Our conclusions are:

First. That the mortgage is not void, because the husband had no power to execute it.

Second. That it is a valid lien on his undivided half, subject to the right of occupancy and use of the whole by the heirs.

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Third. That complainant is entitled to a decree of foreclosure upon the interest of the respondent, subject to the homestead rights of the heirs, whatever those rights may be; and we do not now undertake to define or limit them; that can be properly done only in a proceeding to which they are parties.

Decree accordingly.

FOSTER, *District Judge*, concurs.

WESTERN UNION TELEGRAPH Co. v. BURLINGTON & SOUTHWESTERN RAILWAY Co., on Original Bill — and SMITH v. WESTERN UNION TELEGRAPH Co., on Cross-Bill.

(*District of Iowa. January, 1882.*)

1. TELEGRAPH COMPANY — CONTRACT FOR EXCLUSIVE RIGHT OF WAY ALONG THE LINE OF RAILROAD.— It is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing a line of telegraphic communication along its right of way. Such a contract is void, as being in restraint of trade, contrary to public policy, and in violation of the act of congress of July 24, 1866 (14 Stat. 221).
2. CONTRACTS — SEVERAL PROMISES — SOME ILLEGAL AND THE OTHERS LEGAL.— In a case where the consideration of a contract is tainted by no illegality, but some of the promises are illegal, the illegality of those which are bad does not communicate itself to, or contaminate, others which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another.
3. CONTRACTS IN RESTRAINT OF TRADE — DIVISIBILITY.— A contract in restraint of trade is divisible, and when such a contract contains a stipulation which is capable of being construed divisibly, and one part thereof is void, as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether.
4. ILLEGAL CONTRACT — RIGHTS OF PARTIES IN PROPERTY ACQUIRED THEREUNDER.— A court of equity having jurisdiction of the parties to, and the subject matter of, an illegal contract, will not require one of such parties to give up what he has acquired under it without re-

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quiring the same of the other; and one of such parties will not be allowed to come into a court of equity, and, while retaining all that he has received under the contract, be permitted to retake also what he has parted with under it. Property accumulated under such a contract must, as between the parties, be disposed of according to equity, and a court will not refuse to deal with it upon the ground that it was acquired under an illegal contract.

5. **TELEGRAPH POLES AND WIRES — ARE THEY REAL OR PERSONAL PROPERTY?**— Whether the telegraph poles and wires and instruments used in the construction of a line of telegraph are to be considered as part of the real estate to which they are annexed, may depend upon the intent with which they were erected, and if the parties in interest agree or intend that they shall remain personalty, subject to be removed, such agreement will be enforced.
6. **RIGHT OF WAY OF A RAILWAY — FEE OF THE LAND.**— The question whether a railroad company may acquire the fee of land for right of way, under the statute of Iowa, suggested but not decided.
7. **MORTGAGE — AFTER-ACQUIRED PROPERTY.**— As between the parties, it is well settled that the mortgagee, as to after-acquired property, takes only the interest of the mortgagor; and an agreement between the mortgagor and a third party, that personal property affixed to mortgaged real estate shall retain its character as personalty, is valid without the assent of the mortgagee.
8. **FORECLOSURE SALE — INNOCENT PURCHASER.**— Upon the facts stated in this case, the purchaser of the railroad at foreclosure sale did not acquire title to the telegraph line and property; he was not an innocent *bona fide* purchaser thereof, for value, without notice.

The material facts in this case, upon which the opinion of the court is based, are as follows:

First. On the first of November, 1870, the Burlington & Southwestern Railway Company made its mortgage to certain trustees to secure the payment of certain bonds, whereby it conveyed its then present and future to be acquired property, being its railroad then made and to be constructed from Burlington, Iowa, to St. Joseph, Missouri. The railroad was subsequently constructed over a large part of the route, and a line of telegraph was also constructed along said railroad, under the provisions of the contract hereinafter named between the Western Union Telegraph Company and the said railway company.

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Second. Default having been made by the company, the trustees brought suits in this court and in the circuit court of the United States for the western district of Missouri to foreclose the mortgage. The respondent, Elijah Smith, plaintiff in the cross-bill, was appointed receiver of the road.

Third. The right of way is one hundred feet wide, for which, in some instances, the fee of the land was obtained by the company; while in others, proceedings for condemnation were had under the statutes; but, generally, the company took conveyances from the owners of the land, "for any uses and purposes in any way connected with the construction, preservation, occupation and enjoyment of said railroad."

Fourth. On or about the sixth of June, 1877, decrees of foreclosure were made in both courts, under which, on the twenty-seventh of November, 1880, the property was sold to respondent, Elijah Smith, as trustee for certain bondholders. The sales were subsequently confirmed and deeds executed and delivered to the purchaser.

Fifth. On the twenty-eighth of June, 1871, a contract was entered into between the railway company and the Western Union Telegraph Company for the construction, repair and operation of a telegraph line upon the right of way, in pursuance of which the line was built to Unionville. Up to the twenty-second of June, 1881, said line was operated under the contract.

Sixth. The telegraph company was not made a party to the foreclosure suits; but after the decree, and on the twenty-second of April, 1881, the trustees filed an amendment to the bill in this court, impleading that company, and making certain allegations respecting the contract, the substance of which are stated in the opinion. Subsequently another amendment was filed. To both amendments the telegraph company filed answers. Since the filing of the original bill in this case, these amendments have been dismissed.

Seventh. The said contract provided, among other things,

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that the railway company should furnish the telegraph poles and all the labor, except a foreman, to erect said line of telegraph, and that the telegraph company should furnish wire and insulators, and a foreman to superintend the construction of the line.

Numerous provisions were inserted for the maintenance and operation of the line at the expense of the contracting parties, and providing what contributions should be made by each, and also for the use of the wire of the telegraph company for commercial purposes, and by the railroad company for railroad purposes. The second subdivision of said contract is as follows:

“The said railway company further agrees to give to said telegraph company the exclusive right of way on and along the line of said railway, its branches and extensions, for the construction of telegraph lines for commercial and public uses and business; and said railway company will not transport upon said railway any material for the construction of a line of telegraph in competition with the lines of said telegraph company, except at and for the usual rates charged for similar transportation to other persons doing business with said railway company, nor stop its trains or distribute materials for such parties or their employees at other than regular stations.”

Eighth. On the day of the delivery of the master's deeds to him (on the twenty-second of June, 1881), the said Elijah Smith took possession of the railway property and also of the telegraph lines, and cut their connection with the other lines of the telegraph company, claiming that said telegraph line and property was covered by the mortgage and was conveyed to him by the master's deed.

Ninth. The trustees in the said mortgage and the said Smith had full knowledge that a contract had been made between the railway company and the telegraph company, but said trustees were not informed of the contents thereof, save that some arrangement was thereby made for the operation of said line.

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Tenth. At and over all the offices along the line, signs were conspicuously affixed and exposed, with the name of said telegraph company thereon, and printed message blanks with its name printed thereon as the company operating said lines were exclusively in use in all the offices, and it was notorious that the line was operated as in said contract provided, and this was known to said Smith and the mortgagees and bondholders; but when said Smith took possession of the line, as aforesaid, he removed said signs and telegraph blanks, and did not allow them to be used while he was in possession. The object of the original bill is to enjoin Mr. Smith from preventing the complainant from reconnecting the wires and using the line and enjoying the benefits of the contract. The object of the cross-bill is to obtain decree declaring the telegraph contract void, confirming the title of said Smith, and restraining the telegraph company from interfering with the said telegraph line and property.

Cook & Dodge and John N. Rogers, for complainant.

J. M. Woolworth, P. H. Smyth and Jas. Hagerman, for respondent.

MCCLARY, *Circuit Judge.*— We will consider, in the light of the foregoing facts:

First. What are the rights of the telegraph company, with respect to the telegraph line and property, independently of the foreclosure proceedings; and

Second. To what extent, if at all, are those rights affected by such proceedings.

It is insisted, on the part of the respondent, that the contract which is set out in the original bill, and under which complainant claims, is void, by reason of certain provisions therein contained, which are alleged to be illegal, immoral, and contrary to public policy. Several clauses of the contract have been pointed out as coming within this description, but the one mainly relied upon is the second subdivision thereof, and which is as follows:

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“The said railway company further agrees to give to said telegraph company the exclusive right of way on and along the line of said railway, its branches and extensions, for the construction and use of said telegraph lines for commercial and public uses and business; and said railway will not transport upon said railway any material for the construction of a line of telegraph in competition with the lines of said telegraph company, except at and for the usual rates charged for similar transportation to other persons doing business with said railway company, nor stop its trains or distribute material for such parties or their employees at other than regular stations.”

In our opinion it is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing lines of telegraphic communication along its right of way. The purpose of such contracts is very plainly to cripple and prevent competition, and they are therefore void, as being in restraint of trade and contrary to public policy. They are also in contravention of the act of congress of July 24, 1866, which authorizes telegraph companies to maintain and operate lines of telegraph “over and along any of the military or post roads of the United States which have been or may hereafter be declared such by act of congress.” 14 St. 221.

All railroads are by law made post roads. *Pensacola Tel. Co. v. Western Union Tel. Co.* 96 U. S. 1; *Western Union Tel. Co. v. St. Joseph, etc. R. R. Co.* 1 McCrary, 569; *Western Union Tel. Co. v. Am. Union Tel. Co.* Sup. Court of Georgia, 1880.

We therefore hold the second subdivision of the contract to be void. We are, however, inclined to the opinion that the invalidity of this provision of the contract does not render the entire agreement null and void. The contract embraces several distinct promises on the part of the railway company, besides the one respecting the exclusive right of way, as, for example: 1. That it will furnish and dis-

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tribute the poles; 2. That it will furnish laborers to erect the line; 3. That it will maintain the poles in good order and keep the wires in good repair; 4. That it will furnish office room at its railway stations; 5. That the telegraph company shall control the commercial telegraphing along the line, and receive the proceeds thereof; and numerous other engagements of like character. The consideration for these promises, and for the additional illegal promise concerning the exclusive right of way, was certain promises on the part of the telegraph company, all of which are legal. It is, therefore, a case in which the railroad company makes a number of promises to the telegraph company, one of which promises is illegal, but all the others legal, in consideration of certain promises on the part of the telegraph company, all of which are legal. The rule respecting such a contract is thus stated in Smith's Leading Cases, Hare & Wall. Notes, 5th Am. edition, 502: "In cases where the consideration is tainted by no illegality, but some of the . . . promises . . . are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable, or dependent upon one another."

And in *The Oregon Steam Navigation Company v. Winsor*, 20 Wall. 64, the supreme court laid down the rule that contracts in restraint of trade are divisible, and "when such an agreement contains a stipulation which is capable of being construed divisibly, and one part thereof is void, as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether" (p. 70).

We think the contract is capable of being construed divisibly.

It is not, however, necessary to pass finally upon this question, for we are clearly of the opinion that, even assuming the invalidity of the entire contract, the plaintiff is en-

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titled to relief, unless deprived of its interest in the property by the foreclosure proceedings, of which we shall speak presently. If we leave out of view entirely any claim of right based upon the contract, we find the complainant in possession of a line of telegraph constructed jointly by it and the railway company, each party furnishing portions of the material and labor for its erection, repair and operation.

The railway company furnished the poles and all the labor, except a foreman, to construct the line; the telegraph company furnished a foreman to superintend the work, and also furnished the wire and insulators. This certainly constituted the two companies joint owners of the property. In this respect, the case does not differ materially from several other telegraph cases which have recently been considered in this circuit. *Atlantic and Pacific Tel. Co. v. U. P. R'y Co.* 1 McCrary, 541; *Western Union Tel. Co. v. U. P. R'y Co.* 1 McCrary, 558; *Western Union Tel. Co. v. St. Joseph, etc. R. Co.* 1 McCrary, 565.

In each of these cases the contract, being substantially the same as the one now before us, was held invalid, but the right of the railroad company, in consequence of such invalidity, to take the whole telegraph property, was emphatically denied. The following quotation from the opinion in the case first cited applies to the point now under consideration:

"No case has been cited in argument, nor have I been able to find one, which holds that a court of equity having jurisdiction of the parties to, and the subject matter of, an illegal contract, should require one of such parties to give up what he has received under it, without requiring the other to do the same thing. Many cases hold that a corporation which has made a contract *ultra vires* which has not been fully performed, is not estopped from pleading its own want of power, when sued upon such contract; but that doctrine does not apply to a case where a party comes into a court of equity and, while retaining all that he has received upon

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such a contract, asks to be permitted to retake what he has parted with under it. I take it there is nothing in the law, as there is certainly nothing in the principles of equity, to estop the court from saying that the obligation to return the property transferred under these contracts is mutual, and shall not be enforced against one of the parties without being at the same time enforced against the other. As the parties and subject matter are now before the court, it is the duty of the court, as far as possible, to place them in *statu quo*."

The ruling in that case was, that the railroad company should be restrained by injunction from interfering with the possession of the telegraph company until a bill should be filed, or other proceedings instituted, to cancel and set aside said contracts upon the return of the consideration, and to settle and adjust, upon principles of equity, the accounts between the parties. And in the case last named this court, in discussing the same subject, said:

"If the defendants, after years of acquiescence in the contract in question, after receiving its benefits, and after a property had been built up under it to which others made claim, became suddenly convinced that it was a void contract, it was their duty to apply to the court for relief, praying a cancellation of the contract, and a full and fair settlement of all accounts growing out of its execution in the past. Until they seek some such remedy, and until a fair settlement, and a full accounting can be had, they will be enjoined from attempting to eject the plaintiff or to seize the property."

In the second case the court laid down the rule and cited many authorities to sustain it, that, assuming the invalidity of the contract, and even assuming that it was immoral, the property accumulated and constructed under it must, as between the parties, be disposed of according to equity; and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract.

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Planters' Bank v. Union Bank, 16 Wall. 483, and cases cited.

We are entirely satisfied with the ruling established in these cases, and it follows that the complainant, the Western Union Telegraph Company, is entitled to decree, unless deprived of all interest in the property by the foreclosure proceedings, which will now be considered.

In considering the effect upon the rights of the telegraph company of the foreclosure sale, we will first inquire whether the telegraph poles and wire and the constructed line became a part of the realty, so as to pass under the mortgage to the mortgagees as after-acquired property. It is plain that the parties did not intend to make the line a part of the realty, so as to follow the fee to whomsoever conveyed. The contract into which they entered is entirely inconsistent with such an assumption, for, if the poles, wires and instruments had become at once part of the real estate, it would have been within the power of the railroad company, immediately upon their erection, to convey them to a third party, and thus deprive the telegraph company of all its interest under the contract. Whether the contract is valid or invalid, it may be looked into for the purpose of ascertaining the intent of the parties in placing the poles and wires upon the right of way. But the intention of the parties is not the only thing to be considered. Ordinarily the distinction between real estate and personal property exists in the nature of the thing itself, and does not depend upon the convention of the parties with respect to it. By no agreement of parties can the bricks which are built into the wall, or the shingles that form the roof, or the stones that go into the foundation of a house, be made to retain their character as personal property. This for the reason that they become so inseparably affixed to the realty as to be a part of it, independently of any question as to the intent of the parties. But it is otherwise, says Denio, J., in *Ford v. Cobb*, 20 N. Y. 348, "with things which, being originally personal in their nature, are

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attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to, the things real with which they are connected; though their connection with the land or other real estate is such that, in the absence of an agreement or any special relation between the parties in interest, they would be a part of the real estate."

With respect to this class of property, the parties in interest may agree that it shall remain personalty, subject to be removed. This rule is supported by a long line of well considered cases, and I do not understand that its soundness as a general rule is called in question here. Its application to this case can only be denied on the ground that the respondent is an innocent purchaser at the master's sale, without notice of any claim on the part of the complainant to the telegraph property. We do not find it necessary to decide the important question whether the railroad company has the fee of the land acquired for right of way. We should, however, be slow to hold that a railroad corporation, under the law of Iowa, may obtain for this purpose a strip of land across the state, perhaps cutting through farms and villages, and use it for any purpose except for right of way, or convey it to any party for private use.

The consequences which might flow from such a doctrine would be very serious indeed. Redfield on Railways, 247-249.

As between the parties, it is well settled that the mortgagee, as to after-acquired property, takes only the interest of the mortgagor. Only the interest of the railway company in the telegraph line, subject to the interest of the telegraph company therein, passed under the mortgage. *United States v. New Orleans R. R.* 12 Wall. 362; *Fosdick v. Schall*, 99 U. S. 225; *Myer v. Car Co.* 102 U. S. 1; *Loomis et al. v. R. Co.* District of Iowa, January, 1882.

It only remains to be determined whether the respondent, as purchaser at the master's sale, can be regarded as a *bona*

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fide purchaser of the telegraph line for value, and without notice of the claim of the telegraph company. We think he cannot be so regarded, and for the following reasons:

First. The telegraph company had a right to claim its interest in the telegraph line as personal property against the mortgagee, as well as against the railway company. The consent of the former to its retaining its character as personality was not necessary. *Tift v. Harton*, 53 N. Y. 377, and cases cited.

Whether the purchaser at the foreclosure sale would ordinarily take only the right of the mortgagor in after-acquired property, or should be regarded in the light of a purchaser for value, without notice, need not be determined, because:

Second. The respondent Smith had notice of the complainant's claim upon said property, or, at least, the facts as they existed and were known to him were sufficient to put him upon inquiry. The agreed statement of facts shows that he had operated the road as receiver for nearly five years prior to his purchase, during which time he must have known of the existence of the telegraph contract, and of the fact that the line had been constructed and was being constructed thereunder; and it is stipulated that "the trustees in the aforementioned mortgage and the said Smith had full knowledge that the contract had been made between the railroad company and the telegraph company; but said trustees were not informed of the contents thereof, save that some agreement was thereby made for the operation of the line." This was sufficient to put, not only respondent, but the trustees upon inquiry, and inquiry would have led them to a knowledge of all the facts. Besides, we think the telegraph company was, in an important sense, in possession of the line. All the commercial business done upon it was done in its name. Printed message blanks were in constant use, showing that it was operating the line. Its sign appeared at all the offices along the line, and although the operators were employees of the railway company, we think the possession

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of the telegraph company was sufficiently open and notorious to advise the public and the purchaser, at the foreclosure sale, that they had or claimed an interest in the property.

Third. At the time of the master's sale there was on file in the foreclosure case an amended bill of the trustees in the mortgage, alleging the execution of the telegraph contract, reciting its provisions, and containing the following averment:

"That said contract is subject to said mortgage, and these complainants are entitled to all the rights, privileges and benefits of said railway company, by, in, under, or in relation thereto, and said mortgage is a first lien thereon." And said amended bill prayed for a decree "declaring said contract subject to said mortgage, and said mortgage a prior lien thereon, and foreclosing the right, title and interest of the railway company therein."

To this amended bill an answer was filed, also prior to the master's sale, substantially admitting the allegations contained therein, and consenting to a decree as prayed. After the master's sale, and upon the filing of the bill in the case, said amended bill was dismissed.

Without considering the question so much discussed by counsel, whether this record should operate to estop the complainant from now claiming the ownership of the telegraph line, we have no hesitation in saying that it was sufficient notice to the purchaser at the sale that the telegraph company claimed an interest in that property, so that he was not a purchaser for value and without notice.

We are thus brought to the conclusion that the rights of the complainant, the telegraph company, were in no wise affected by the foreclosure proceedings.

The respondent, in his cross-bill, does not offer to account. He does not recognize, but, on the contrary, distinctly repudiates the claim of complainant of an interest in the telegraph property. The claim of the respondent plainly is, that he is the owner of the entire line and entitled to the possession and control of the same without interference from the

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complainant. In his answer he distinctly admits the seizing of the telegraph property and lines, and the cutting of the wires to destroy the connection between them and the remaining portion of the Western Union Telegraph system, and the prayer of his cross-bill is, that the telegraph company may be enjoined from intermeddling or interfering with said lines and wires. In accordance with the principles above announced, the decree must, therefore, be against the complainant in the cross-bill. The prayer of the complainant in the original bill is as follows:

“Therefore, your orator prays that an injunction may issue to restrain these defendants, their agents, servants and employees, from preventing your orator’s reconnecting the wires that have been severed as aforesaid, and to restore the connections, which have been severed, and from preventing your orator from using the said lines and wires, and enjoying the benefits to which it is entitled under said contract of June 28, 1871, and from interfering with your orator in the use of said telegraph wires, until the rights of the parties may be adjudicated in the said foreclosure proceeding herein heretofore referred to, and until the further order of this court, and that upon the final hearing of this cause, the said injunction may be made perpetual.”

We do not think it proper to grant the complainant all the relief here asked, but, in our view of the case, it is entitled to a decree to enjoin and restrain the respondents, their agents, servants and employees, from preventing the complainant’s reconnecting any wire that may have been severed, and from interfering with the restoration of any connection that may have been severed, and from preventing complainant from possessing and using said lines and wires as heretofore, until the rights of the parties with respect thereto shall be adjudicated.

LOVE, *District Judge*, concurs.

NOTE.—In support of the proposition that a contract creating a monopoly in one company or individual of any branch of the carrying trade, or of any business in which the community at large have a direct

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interest, the following additional authorities may be cited; *Wright v. Ryder*, 36 Cal. 243; *Taylor v. Blanchard*, 18 Allen, 370; *Rex v. Waddington*, 1 East, 143; *Arnat v. Coal Co.* 68 N. Y. 558; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. St. 173; *Crawford v. Wick*, 18 Ohio St. 190; *Cent. Ohio Salt Co. v. Guthree*, 35 Ohio, 666; *Craft v. McConoughy*, 79 Ill. 346; *In re India Bagging Association*, 14 La. Ann. 168. Upon the question of the divisibility of the contract, the reporter takes pleasure in adding the following comments by Francis Wharton, Esq., in a recently published note to this case in the Federal Reporter:

"When there are several stipulations in a particular agreement, the fact that one of those stipulations is illegal does not defeat a recovery on the others, when the stipulations are divisible and the consideration is not in itself illegal. *Green v. Price*, 13 M. & W. 695; *Price v. Green*, 15 M. & W. 346; *Bank of Australasia v. Briellat*, 6 Mo. P. C. 152; *Mayfield v. Wadsley*, 3 B. & C. 34; 5 D. & R. 228; *Kennan v. Cole*, 8 East, 336; *McAllen v. Churchill*, 11 Moore, 488; *Gelpcke v. Dubuque*, 1 Wall. 175; *Goodwin v. Clarke*, 65 Me. 280; *Carlton v. Woods*, 28 N. H. 290; *Van Dyck v. Van Beuren*, 1 Johns. 362; *Saratoga Bank v. King*, 44 N. Y. 89; *Leavitt v. Palmer*, 3 Comst. 19; *Woole v. Gray*, 6 Barb. 398; *Tracy v. Talmadge*, 4 Kern. 162; *Leavitt v. Blatchford*, 5 Barb. 9. See Benj. Sales, § 505; *Mallan v. May*, 11 M. & W. 653; *Carrigan v. Ins. Co.* 53 Vt. —; *Lange v. Werk*, 2 Ohio St. 519; *Widoc v. Webb*, 20 Ohio St. 431; *Hynes v. Hayes*, 25 Ind. 31; *Kimbrough v. Lane*, 11 Bush, 556; *Newbury Bank v. Stigall*, 41 Miss. 142; *Valentine v. Stewart*, 15 Cal. 387. In *Carrigan v. Ins. Co.* 53 Vt., it was held that while an insurance of liquors for illegal sale is invalid, in a case where the assured was a druggist, and only a small proportion of the property insured was liquor, and nothing of illegality appearing in the contract, or in the design in entering into it, and the contract being collateral to the occasional acts of unlawful selling, it is not invalid.

"A contract may be fraudulent or otherwise illegal as to the parties, yet bind as to those persons innocently taking title under it. And a contract may be divisible so as to be bad as to parties, but good as to strangers acting *bona fide* on it. *Bradway's Estate*, 1 Ash. 212.

"In other words, 'in cases where the consideration is tainted by no illegality, but some of the conditions or promises are illegal, the illegality of those which are bad does not communicate itself to or contaminate those which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another.' Smith's L. C. (7th Am. ed.) 681. *A fortiori*, when a transaction is separated by the parties into two agreements, one legal and the other illegal, the legal agreement can be enforced, and the transaction *pro tanto* sustained. *Odessa Co. v. Mendel*, L. R. 8 Ch. D. 235.

"It is otherwise when the stipulations, legal and illegal, are so interwoven that the legal one cannot be sustained without sustaining the illegal. 1 Wm. Saund. 66, note 4; *Waite v. Jones*, 1 Scott, 59; *Neuman*

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v. *Neuman*, 4 M. & S. 68; *Gaskell v. King*, 11 East, 165; *Wigg v. Shuttleworth*, 13 East, 440; *Ladd v. Dillinghast*, 184 Me. 316; *Woodruff v. Heyneman*, 11 Vt. 592; *Saratoga Bank v. King*, 44 N. Y. 87; *Rose v. Truax*, 21 Barb. 361; *Donallan v. Lenox*, 6 Dana, 91; *Langdon v. Gray*, 52 How. (N. Y.) Pr. 387; *Frazier v. Thompson*, 2 Watts & S. 235; *Tobey v. Robinson*, 99 Ill. 222.

"The general rule is, that where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good." Willes, J., in *Pickering v. R. R. L. R.* 3 C. P. 250 (adopted in Leake, 2d ed. 781), citing *Mauleverer v. Redshaw*, 1 Mod. 85; *Collins v. Blantern*, 2 Wils. 351. See *Gelpcke v. Dubuque*, 1 Wall. 221; *U. S. v. Bradley*, 10 Pet. 343; *Deering v. Chapman*, 22 Me. 316; *Roby v. West*, 4 N. H. 285; *Coburn v. Odell*, 30 N. H. 540; *Woodruff v. Heniman*, 11 Vt. 592; *Frazier v. Thompson*, 2 Watts & S. 235; *Raguet v. Roll*, 7 Ohio, 70; *McBratney v. Chandler*, 22 Kan. 692; *Everhardt v. Puckatt*, 73 Ind. 409; *Anderson v. Powell*, 44 Iowa, 20.

So far as concerns the statute of frauds, the same test is applied. When part of a contract is invalidated by that statute and the contract is severable, then the invalidation is only *pro tanto*; though it is otherwise when the contract cannot be severed. *Mayfield v. Wadsley*, 3 B. & C. 361; S. C. 5 D. & R. 228; *Lexington v. Clark*, 2 Vt. 223.

Thus, where C., having contracted to do certain work for E., but the work being suspended on account of failure on E.'s part to pay, and T. having asked C. to go on with the work, promising to pay him in full, it was held that C. could recover from T. for the work done after the promise, but not for that done before the promise. *Rand v. Mather*, 11 Cush. 1. And, generally, the fact that a deed contains powers or conditions that are illegal does not avoid the deed, unless these powers or conditions qualify the whole conveyance. If they are independent and can be severed without injuring the contract, their illegality does not vitiate the other portions of the deed. *Pickering v. R. R. L. R.* 3 C. P. 235; *Payne v. Brecon*, 3 H. & N. 572; *Greenwood v. Bp. of London*, 5 Taunt. 527.

It is said also by Mr. Pollock (Cont. 3d ed. p. 338), that where any part of the consideration for a promise, or set of promises, is unlawful, the whole agreement is void. This undoubtedly holds good in cases in which the unlawful consideration permeates the whole contract, as where, for instance, the consideration of a promise (or a series of promises) is (1) illicit cohabitation, and (2) the securing the services of a housekeeper. But it is otherwise where the illegal consideration does not permeate the whole contract. Supposing, for instance, A. agrees to pay B. \$100 for goods sold, part being sold on Sunday, and part on

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of the telegraph company was sufficiently open and notorious to advise the public and the purchaser, at the foreclosure sale, that they had or claimed an interest in the property.

Third. At the time of the master's sale there was on file in the foreclosure case an amended bill of the trustees in the mortgage, alleging the execution of the telegraph contract, reciting its provisions, and containing the following averment:

"That said contract is subject to said mortgage, and these complainants are entitled to all the rights, privileges and benefits of said railway company, by, in, under, or in relation thereto, and said mortgage is a first lien thereon." And said amended bill prayed for a decree "declaring said contract subject to said mortgage, and said mortgage a prior lien thereon, and foreclosing the right, title and interest of the railway company therein."

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complainant. In his answer he distinctly admits the seizing of the telegraph property and lines, and the cutting of the wires to destroy the connection between them and the remaining portion of the Western Union Telegraph system, and the prayer of his cross-bill is, that the telegraph company may be enjoined from intermeddling or interfering with said lines and wires. In accordance with the principles above announced, the decree must, therefore, be against the complainant in the cross-bill. The prayer of the complainant in the original bill is as follows:

"Therefore, your orator prays that an injunction may issue to restrain these defendants, their agents, servants and employees, from preventing your orator's reconnecting the wires that have been severed as aforesaid, and to restore the connections, which have been severed, and from preventing your orator from using the said lines and wires, and enjoying the benefits to which it is entitled under said contract of June 28, 1871, and from interfering with your orator in the use of said telegraph wires, until the rights of the parties may be adjudicated in the said foreclosure proceeding herein heretofore referred to, and until the further order of this court, and that upon the final hearing of this cause, the said injunction may be made perpetual."

We do not think it proper to grant the complainant all the relief here asked, but, in our view of the case, it is entitled to a decree to enjoin and restrain the respondents, their agents, servants and employees, from preventing the complainant's reconnecting any wire that may have been severed, and from interfering with the restoration of any connection that may have been severed, and from preventing complainant from possessing and using said lines and wires as heretofore, until the rights of the parties with respect thereto shall be adjudicated.

LOVE, *District Judge*, concurs.

NOTE.—In support of the proposition that a contract creating a monopoly in one company or individual of any branch of the carrying trade, or of any business in which the community at large have a direct

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7. **SAME — WHERE THERE HAS BEEN NO PREVIOUS ARRANGEMENT AS TO RATES.**— Where no previous arrangement has existed, the court may devise a mode of compensation to be paid as the business progresses, with power of final revision.
8. **SAME — WHERE A PREVIOUS ARRANGEMENT HAS EXISTED.**— Courts may assume that rates of compensation which have existed between such companies are *prima facie* reasonable and just, and may require parties to conform to them as their business progresses, with the right on either side to keep and present an account of their business to the court at stated intervals, and claim an addition to or rebate from the amount so paid.
9. **SAME — RAILROAD COMPANIES ENTITLED TO SECURITY.**— In such cases the railroad company may require a bond from the express company in advance to secure the payment of any amount which may thereafter be found to be due.
10. **SAME — PROVISIONS OF THE CONSTITUTIONS AND STATUTES OF MISSOURI AND ARKANSAS.**— Statutory and constitutional provisions establishing maximum rates for transportation of passengers and freight on railroads, and forbidding discrimination in charges or facilities in transportation between transportation companies and individuals, do not present any obstacles to the enforcement of the rights of express companies in the manner above indicated.

In equity.

In the case of the *Southern Express Co. v. St. Louis, Iron Mountain & Southern R'y Co.*, the plaintiff avers, in substance, that it is a corporation organized under the laws of Georgia, and has for a long time been engaged in doing an express business; that prior to the eleventh of May, 1880, it had been doing business as an express company, on the defendant's road, under a contract which the defendant was at liberty to rescind; that on the eleventh day of May, 1880, the defendant, through its president, notified the complainant by letter that after the twenty-sixth inst. it could not do business over defendant's road; that the plaintiff is lawfully entitled to demand and to receive the same facilities of transportation on said road as may be accorded by defendant to itself, and that it is entitled to deductions for accessorial service.

The bill concludes with the following prayers:

- (1) That during the pendency of the suit the defendant

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may be restrained from interfering with the facilities now enjoyed by the Southern Express Company, now accorded it; from interfering with its messengers; from refusing to receive and transport, in the same manner as defendant is now doing, the express matter and messengers of the Southern Express Company, or interfering with its business or present relations with defendant in any manner whatever, so long as the express company is willing and ready to pay according to all legal rates therefor.

(2) That if, during the pendency of the suit, any dispute should arise between the parties as to what is reasonable compensation for transportation, the complainant may be permitted to bring the matter before the court for its decision.

(3) That defendant may be required to transport the express matter, safes, and messengers of the Southern Express Company by the same trains, and to the same accommodation, as it may transport its own express matter; that it be required to transport express matter for statutory tolls and compensation, as provided by law; that defendant may be required to make a reasonable rebate or reduction from its charges to the Southern Express Company, to be fixed by decree of court, by reason of its performance of accessorial service as specified.

(4) That a permanent injunction may issue to the same purport and effect as is prayed in regard to a preliminary injunction.

The defendant, in its answer, denies the material allegations of the bill, and avers:

That since the first of June, A. D. 1880, it has formed and organized an express department of its road, and has been and is now receiving and transporting over its lines, and delivering freight commonly known as express freight, as it has a right to do; that the express business is a legitimate business of defendant; that it can serve the public without the intervention of the Southern Express Company, and can serve it as well, and that it is unjust to the stockholders of

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the company to permit a third party to make use of the property of defendant, and the services of its employees to reap the profit for the transportation of freight which belongs to it; that the compensation it has received from the plaintiff for transportation over its lines during the term of the existence of the contract was inadequate for the service performed; that the conduct of complainant in the management of its business, its intervention between defendants and its customers, its taking a large amount of freight which was not properly express freight; its continued violation of its contracts under which it was permitted to do an express business, and its concealment and withholding true and correct reports of the weights of express freights transported over defendant's line of road, occasioned great damage to defendant, and compelled the termination of said contract; that as a common carrier it owes to complainant no other duty than to any other person desiring to transport freight over its road; that defendant does not claim the right to exclude the transportation of express matter of complainant over its road, and has always been willing, and is now willing, to transport any express matter in spaces in its cars selected by itself, and under the supervision, care, and control of its own employees, and denies that complainant has any right to have allotted to itself any particular space in defendant's cars, or to permit its messengers to take charge of its express freight.

The plaintiff filed a general replication in the usual form. Substantially the same points of law were raised by the pleadings in the other cases. A preliminary injunction was granted in the case of the *Southern Express Co. v. St. L., I. M. & S. R'y Co.*, November 6, 1880. The case came up for final hearing before Miller and McCrary, JJ., at St. Louis, Missouri, on the seventh of February, A. D. 1882. Attorneys for the parties to all the above-entitled causes were present, and in pursuance of an agreement between them, all of said causes were argued and submitted together, so far as the questions of law therein involved were concerned.

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Glover & Shepley, S. M. Breckenridge, and F. E. Whitfield, for the plaintiff in the case of the *Southern Express Co. v. St. Louis, Iron Mountain & Southern Railway Company.*

F. E. Whitfield, for the plaintiff in the case of the *Southern Express Company v. Missouri & Little Rock Railway Company.*

Clarence A. Seward, for the Adams Express Company in all three of the cases; and —

George F. Edmunds, John A. Campbell and Clarence A. Seward, for the plaintiffs generally.

Gov. John C. Brown appeared for the defendants generally.

Jas. O. Broadhead and Thomas J. Portis, for the St. Louis, Iron Mountain & Southern Railway Company.

B. C. Brown, for the Memphis & Little Rock Railway Company.

G. R. Peck, for the Atchison, Topeka & Santa Fe Railway Company.

Lyman K. Bass, for the Denver & Rio Grande Railway Company.

Thomas J. Portis, for the Missouri, Kansas & Texas Railway Company.

MILLER, *Circuit Justice.*—In these cases argued before me at Louis, with Judges McCrary and Treat, I can do no more than present certain general conclusions at which my mind has arrived in regard to the propositions argued by counsel.

First. I am of the opinion, that what is known as the express business is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized.

That, while it is not possible to give a definition in terms

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which will embrace all the classes of articles so usually carried, and to define it with precision by words of exclusion, the general character of the business is sufficiently known and recognized as to require the court to take notice of it as distinct from the transportation of the large mass of freight usually carried on steamboats and railroads.

That the object of this express business is to carry small and valuable packages rapidly, in such a manner as not to subject them to the danger of loss and damage which, to a greater or less degree, attends the transportation of heavy or bulky articles of commerce, as grain, flour, iron, ordinary merchandise, and the like.

Second. It has become law and usage, and is one of the necessities of this business, that these packages should be in the immediate charge of an agent, or messenger, of the person or company engaged in it; and to refuse permission to this agent to accompany these packages on steamboats or railroads on which they are carried, and to deny them the right to the control of them while so carried, is destructive of the business, and of the rights which the public have in the use of the railroads in this class of transportation.

Third. I am of the opinion that, when express matter is so confided to the charge of an agent or messenger, the railroad company is no longer liable to all the obligations of a common carrier, but that when loss or injury occurs, the liability depends upon the exercise of due care, skill and diligence on the part of the railroad company.

Fourth. That, under these circumstances, there does not exist on the part of the railroad company the right to open and inspect all packages so carried, especially when they have been duly closed or sealed up by their owners or by the express carrier.

Fifth. I am of the opinion that it is the duty of every railroad company to provide such conveyances by special cars, or otherwise, attached to their freight or passenger trains, as are required for the safe and proper transportation

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of this express matter on their roads, and that the use of these facilities should be extended on equal terms to all who are actually and usually engaged in the express business.

If the number of persons claiming the right to engage in this business at the same time, on the same road, should become oppressive, other considerations might prevail; but until such a state of affairs is shown to be actually in existence, in good faith, it is unnecessary to consider it.

Sixth. This express matter, and the person in charge of it, should be carried by the railroad company at fair and reasonable rates of compensation; and where the parties concerned cannot agree upon what that is, it is a question for the courts to decide.

Seventh. I am of the opinion that a court of equity, in a case properly made out, has the authority to compel the railroad companies to carry this express matter, and to perform the duties in that respect which I have already indicated, and to make such orders and decrees, and to enforce them by the ordinary methods in use necessary to that end.

Eighth. While I doubt the right of the court to fix in advance the precise rates which the express companies shall pay, and the railroad companies shall accept, I have no doubt of its right to compel the performance of the service by the railroad company, and, after it is rendered, to ascertain the reasonable compensation and compel its payment.

Ninth. To permit the railroad company to fix upon a rate of compensation which is absolute, and insist upon the payment in advance, or at the end of every train, would be to enable them to defeat the just rights of the express companies, to destroy their business, and would be a practical denial of justice.

Tenth. To avoid this difficulty, I think that the court can assume that the rates, or other mode of compensation heretofore existing between any such companies, are *prima facie* reasonable and just, and can require the parties to conform to it as the business progresses, with the right to either party

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to keep and present an account of the business to the court at stated intervals, and claim an addition to, or rebate from, the amount so paid.

And to secure the railroad companies in any sum which may be thus found due them, a bond from the express company may be required in advance.

Eleventh. When no such arrangement has heretofore been in existence, it is competent for the court to devise some mode of compensation to be paid as the business progresses, with like power of final revision on evidence, reference to master, etc.

Twelfth. I am of opinion that neither the statutes nor constitutions of Arkansas or Missouri were intended to affect the right asserted in these cases; nor do they present any obstacle to such decrees as may enforce the rights of the express companies.

NOTE.—See *Southern Express Co. v. St. Louis, Iron Mountain & Southern Railway Co.* 2 McCrary, 570.

In the case first named the following final decree was subsequently rendered:

And now this day come the parties aforesaid, and by their counsel, then and there present, bring on this cause to be heard on the pleadings and proofs, and the same were then and there presented to the court, and the argument of counsel for the respective parties is heard, and the said cause is then and there submitted, and due deliberation having been thereupon had,—

It is by the court ordered, adjudged, and decreed as follows:

(1) That the express business, as fully described and shown in the record, is a branch of the carrying trade that has, by the necessities of commerce and the usages of those engaged in transportation, become known and recognized, so as to require the court to take notice of the same, as distinct from ordinary transportation of the large mass of freight usually carried on steamboats and railroads.

(2) That it has become the law and usage, and is one of the necessities of the express business, that the property confided to an express company for transportation should be kept, while in transit, in the immediate charge of the messenger or agent of such express company.

(3) That to refuse permission to such messengers or agents to accompany such property on the steamboats or railroads on which it is to be carried, and to deny to them the right to the custody of the property

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while so carried, would be destructive of the express business, and of the rights which the public have to the use of such steamboats and railroads for the transportation of such property so under the control of such messengers or agents.

(4) That the defendant, its officers, agents, and servants, have no right to open or inspect any of the packages or express matter which may be offered to it for transportation by the plaintiff's company, or to demand a knowledge of the contents thereof, nor to refuse transportation thereof, unless such inspection be granted or such knowledge be afforded.

(5) That it is the duty of the defendant to carry the express matter of the plaintiff's company, and the messengers or agents in charge thereof, at a just and reasonable rate of compensation, and that such rate of compensation is to be found and established as a unit, and is to include as well the transportation of such messengers or agents as of the express matter in their custody and under their control.

(6) That on and subsequent to the first day of April, 1878, the said defendant afforded to the said plaintiff all the facilities needed by it for the conduct of its express business over the defendant's lines, and such as were specifically provided for in the contracts in the bill herein set forth; that thereafter the defendant notified the plaintiff that such facilities would be withdrawn; and that it was the intention and purpose of the defendant to exclude the plaintiff's company from its lines on and after the twenty-fifth day of May, 1880; that such intention and purpose were restrained by the preliminary injunction order of the court, which said injunction order was afterwards modified, as appears in the record.

(7) That it is the duty of the defendant to afford to the plaintiff all express facilities, and to the same extent and upon the same trains that said defendant may accord to itself, or to any other company or corporation engaged in the conduct of an express business on the defendant's lines, and to afford the same facilities to plaintiff on all its passenger trains.

(8) That the plaintiff keep and render monthly a true account of the services performed for it by defendant, and pay therefor at the rate hereinafter specified, on or before the fifteenth of each month after the date hereof, for the business of the month preceding, and that the defendant has no right to require prepayment for said express facilities, or payment therefor at the end of every train, or in any other manner than as is herein provided; and that plaintiff execute and deliver to the defendant a bond in the sum of one hundred and fifty thousand dollars (\$150,000), conditioned well and faithfully to make such payments as are herein provided, and with surety to be approved by a judge of the court.

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(9) That it is and was the duty of the said defendant to afford and to have afforded such facilities to the plaintiff as herein specified for a just and reasonable compensation.

(10) Whereas, it is alleged by complainant that, since the commencement of this suit, and the service of the preliminary order of injunction herein, the defendant has, in violation of said injunction and of the rights of complainant, made unjust discriminations against complainant, and has charged complainant unjust and unreasonable rates for carrying express matter; therefore, it is ordered that complainant have leave hereafter to apply for an investigation of these and similar allegations, and for such order with respect thereto as the facts, when ascertained, may justify, and for the appointment of a master to take proof and report thereon.

(11) That the defendant, its officers, agents, servants and employees, and all persons acting under their authority, be, and they hereby are, permanently and perpetually enjoined and restrained from interfering with, or disturbing in any manner, the enjoyment by the plaintiff of the facilities provided for in this decree to be accorded to it by the said defendant upon its lines of railway, or such as have been heretofore accorded to it, for the transaction of the business of the plaintiff, and of the express business of the public confided to its care, and from interfering with any of the express matter or messengers of the plaintiff, and from excluding or rejecting any of its express matter or messengers from the depots, trains, cars, or lines of the said defendant, as the same are by this decree directed to be permitted to be enjoyed and occupied by the said plaintiff, and from refusing to receive and transport in like manner as the said defendant is now transporting, or as it may hereafter transport, for itself or for any other express company, over its lines of railway, the express matter and messengers of the said plaintiff, and from interfering with or disturbing the business of the said plaintiff in any way or manner whatsoever; the said plaintiff paying for the services performed for it by the defendant monthly, as herein prescribed, at a rate not exceeding fifty per centum more than its prescribed rates for the transportation of ordinary freight, and not exceeding the rate at which it may itself transport express matter on its own account, or for any other express or other corporation, or for private individuals, reserving to either party the right at any time hereafter to apply to this court, according to the rules in equity proceedings, for a modification of this decree, as to the measure of compensation herein prescribed.

It is further ordered, adjudged and decreed, that the defendant pay the costs to be taxed herein, and an execution on a fee bill issue therefor.

GEO. W. MCCRARY,
Circuit Judge.

Smith & Downs v. Reynolds.

SMITH & DOWNS v. REYNOLDS.

*(District of Colorado. September, 1880.)*1. **TITLE BONDS — NUDUM PACTUM — BILL FOR SPECIFIC PERFORMANCE. —**

Where a bill for specific performance was brought, based upon a title bond, whereby the obligors bound themselves to convey certain property to the obligees upon certain payments being made, *held*, that such a bond could not be enforced for want of consideration.

The complaint was a bill for specific performance, based upon a title bond, executed by three of the defendants to the complainants, in pursuance of which they bound themselves to convey three-fifths of the "Terrible Mine" to the plaintiffs, upon the payment of certain sums therein named, within a specified time. Before the expiration of the time the said three defendants had sold and conveyed the property to John H. Maugham, and he had conveyed to A. E. Reynolds. Reynolds set up in his answer that the title bond was given without consideration. The complainants excepted to this portion of Reynold's answer.

HALLETT, *District Judge*.— As to the exception to the separate answer of Reynolds, alleging that the bond executed by three of the defendants to the plaintiffs was a voluntary bond, executed without any consideration, in my opinion it is not well taken. This exception must be overruled. Such bonds are of no force or effect whatever unless carried out by the obligees tendering the whole, or some part of the agreed price, and the obligors accepting the same. To say that such a bond is capable of being enforced is to assert that one party is bound, while the other is not. If the purchaser is not bound, neither is the vendor. It is not the case of a contract founded upon mutual promises, which is always enforceable. When there is a promise to sell, but no promise to buy, there is no contract. It is a promise without consideration. Of course, if the seller, when it is still within his power to sell, accepts the money, or some part of it, he is bound to make the conveyance; or, if the consideration be

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that the obligee shall sink a shaft until mineral is struck, or that he shall do other work on the mine, the case would be different. In that event there would be no want of mutuality. It would be the case of an ordinary agreement, based upon a consideration.

But in the case before us the plaintiffs did not agree to take the property. Is it possible that Clark, Patton and Ottman were bound to sell, while Downs and Smith were not bound to buy? This I do not understand to be the law. I have always regarded this class of bonds as being without validity. I know there are some good lawyers who maintain that such a bond may be treated as a continuing offer during the time limited therein, and that the offer may be accepted at any time during that period. But this is not my view of the law. Mr. Thomas stated that he could furnish some authorities which lay down a different doctrine. I now think this part of the answer presents a good defense. At the final hearing, upon a more extended examination of the authorities, my views may be modified, but as at present advised, my conviction is that this bond is without validity.

CAVENDER v. CAVENDER.

(Eastern District of Missouri. September, 1881.)

1. PLEADING — GENERAL REPLICATION.— The purpose of a general replication is to put in issue the new matter set forth in the answer.
2. SAME — EFFECT OF GENERAL DENIAL AS TO ADMISSIONS IN ANSWER.— A complainant does not deprive himself of the benefit of admissions in the respondent's answer by a general denial of the allegations thereof.
3. SAME — SAME — EVIDENCE.— Where a devise is alleged in the bill and admitted in the answer, it is not necessary, though proper, for the complainant to produce the will in evidence.
4. TRUSTS — DUTY OF TRUSTEE — INVESTMENT OF FUND — NEGLIGENCE OF DUTY — INSOLVENCY — REMOVAL — APPOINTMENT OF NEW TRUSTEE — HIS DUTIES.— A. died, leaving a will, in which he named B. as

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his executor, and by which he devised one-half of his property, after the payment of his debts, to B., in trust for C., during his natural life, to be invested in real and personal securities, and the income therefrom to be paid to C. semi-annually. B. qualified as executor, and subsequently, as executor, turned over the portion of the real estate devised as aforesaid to himself as trustee, and as trustee receipted to himself as executor therefor, was discharged as executor, and gave bond as trustee, but failed for more than two years to invest money receipted for by him as trustee, or to pay C. his share of the income from real estate left by A., and became insolvent. C. brought suit to have B. removed and a new trustee appointed, and for damages suffered by him from B.'s neglect of duty, and it was *held*: (1) That it was B.'s duty to have invested the fund that came into his hands as trustee, within a reasonable time after he qualified as such, at the current rate of interest, and to have paid the income therefrom, and one-half the income derived from said real estate, to C. semi-annually. (2) That B. should be removed from his trust and a new trustee appointed, whose duty it would be—*First*, to collect from B. and his sureties said principal sum received by B., and interest thereon from the time B. qualified as trustee; *second*, to collect from B. and his sureties one-half the income, if any, received by him from said real estate, and to pay the same, together with interest recovered, to C.; *third*, to invest said principal sum, and pay the income therefrom to C., as provided by said will; and, *fourth*, to collect, in the future, C.'s share of the income from said real estate and pay it over to him.

In equity.

McCRARY, *Circuit Judge*.—We have considered this case upon the evidence and argument of counsel, and our conclusions are as follows:

1. The pleadings sufficiently show that John Cavender bequeathed one-half of his estate, after the payment of his debts, to respondent in trust for complainant during his natural life, to be invested in real or personal securities, and the income to be paid to the complainant semi-annually. This is distinctly alleged in the bill, and as distinctly admitted in the answer. It is true that the answer contains an averment that, by the terms of the will, after the lapse successively of

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the life estates of complainant and Caroline M., his wife, in the trust property, such property will descend to respondent and his heirs in fee-simple forever, discharged of the trust; but this allegation is immaterial, since we are now asked to deal with the income of the trust fund only during the natural life of the complainant. Nor does the fact that there is a general denial of the allegations of the answer by complainant's replication deprive him of the benefits of the admissions contained in the answer.

The purpose of the general replication is to put in issue any new matter set forth in the answer. It does not nullify the effect of an admission in the answer of an allegation of the bill. While it would have been proper for complainant to have produced the will in evidence, and we think it would have been better if he had done so, we are constrained to hold that respondent is bound by the admissions of his answer, and that they are broad enough to relieve complainant from the necessity of producing the will itself.

2. We are of the opinion that the proof sufficiently shows that respondent John S. Cavender, as executor of the will of John Cavender, deceased, stood charged, in his official capacity, in the sum of \$17,169.40, which sum, on the twenty-third of April, 1879, he turned over to himself as trustee for the complainant under said will, and executed a receipt therefor from himself as trustee to himself as executor; that upon filing said receipt in the probate court of the city of St. Louis, and upon giving bond and security approved by said court for the faithful administration of said trust fund, he was, by the said probate court, on the thirtieth day of April, 1879, discharged as executor, and stood charged for that amount as trustee. All these facts appear in the certified transcript of proceedings of said probate court, including a certified copy of the said receipt, bond, and discharge, and by the deposition of McEntire, the deputy clerk of said court, who testified that said papers are true copies of the originals on

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file, and of entries made upon the record of said probate court.

There is no testimony tending to show that the said final receipt and bond were not in fact executed by respondent, nor that the transcript is not a true copy of the original record and of the papers filed in the course of the proceedings in the probate court.

The proof before us, if not conclusive, is certainly *prima facie* evidence of the facts relied upon by the complainant.

3. This fund of \$17,169.40 came into the hands of the respondent, as trustee, on the thirtieth day of April, 1879, and it was his duty, within a reasonable time, to invest it at the current rate of interest, and to pay the income therefrom semi-annually to the complainant. He has, for more than two years, neglected to do either; and he admits, in his testimony, that he is insolvent.

It is clearly the duty of the court, under such circumstances, to remove him from his trusteeship, and to appoint some suitable person, whose duty it will be to proceed to collect, from him and the sureties on his bond, the said sum, with interest from the time it came into his hands. The interest, when collected, will be payable to complainant; the principal will be, by the trustee, invested at current rate of interest, as provided by the will, and the semi-annual income will be by the trustee paid to the complainant.

4. It appears in evidence that there is certain real estate in the county of ———, Illinois, which belongs to the estate of John Cavender, deceased, the one-half of the income of which heretofore received by the respondent, if any, and also one-half of its income in the future, is payable to the complainant.

It will be the duty of the trustee to proceed to collect from respondent and his sureties one-half of any income he may have received from said real estate since the thirtieth day of April, 1879, and also to take measures to recover hereafter the portion of the income from said real estate which prop-

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erly belongs to the complainant, and to pay the same over to him.

Let decree be entered accordingly.

T. A. & H. M. Post, for complainant.

John R. Shepley, Lucien Eaton and J. S. Garland, for respondent.

THIRD NAT. BANK OF ST. LOUIS v. HARRISON and another.

(*Eastern District of Missouri. September, 1881.*)

1. STATUTES — CONSTRUCTION OF — REPEAL BY IMPLICATION.—An earlier statute is only repealed by a later one when their provisions cannot be reconciled.
2. SAME — SAME.— A later statute which is general and affirmative in its provisions will not abrogate a former one which is particular or special.
3. SAME — SAME.— An exposition of a statute which will revoke or alter by construction of general words a previous general statute should not be adopted where the words may have their proper operation without it.
4. ACT OF MARCH 3, 1875, CONSTRUED.— The act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States, to regulate the removal of causes from the state courts, and for other purposes," did not repeal subdivision 10, § 629, of the Revised Statutes.
5. JURISDICTION OF CIRCUIT COURTS — NATIONAL BANKS — REV. ST. § 629, SUBD. 10.— Circuit courts have jurisdiction over suits by or against national banks without regard to the questions in controversy.
6. SAME — REV. ST. § 740.— Where there are two districts in a state a national bank may bring a suit, not of a local nature, in the circuit court of the one in which it is located, against two or more defendants, one or more of whom reside in the other district, if one of them resides in the district in which suit is brought.

This is an action brought by the plaintiff, a corporation organized under the national banking act, against the defendants, to recover judgment upon a certain promissory note

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executed by the defendant Harrison to his co-defendant Alexander, and by the latter assigned to the plaintiff. The plaintiff is a national bank, located in the city of St. Louis, Missouri, and the defendants are citizens of the state of Missouri, the defendant Harrison being a citizen of the western district thereof. Upon these facts the defendant Harrison moves to dismiss the cause for want of jurisdiction.

Dyer & Ellis, for plaintiff.

Alexander Graves, for defendant.

McCARY, *Circuit Judge (orally)*.— It is insisted by counsel for defendant — *First*, that this court has no jurisdiction in the case under the act of congress, approved March 3, 1875, entitled “An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes,” which act, it is insisted, repeals all prior acts upon the subject of the jurisdiction of the circuit courts, including the provision authorizing suits therein by national banks. I am of the opinion that the jurisdiction in this case cannot be maintained under the act of March 3, 1875, alone; and if the effect of that act is, as contended by counsel, to repeal so much of section 629 of the Revised Statutes as gives the circuit courts jurisdiction of all suits by or against any banking association established in the district for which the court is held, it follows that the present motion must be sustained. But it is very clear that the act of 1875 has no such sweeping effect as that claimed for it by counsel. It is a general statute on the subject of the jurisdiction of the circuit courts, and it does not repeal prior statutes conferring jurisdiction upon those courts in special cases, or over particular controversies, unless it is clear from the language employed that such was the intent of congress. There is no express repeal of section 629 of the Revised Statutes. The law does not favor a repeal by implication, and in order to support

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such a repeal the repugnance between the latter and earlier statutes must be quite plain. If the subsequent act can be reconciled with the former it will not be held to repeal it.

Again, it is a rule long settled, that a later statute which is general and affirmative in its provisions does not abrogate a former which is particular or special. Courts will not allow such an exposition of the statute as will revoke or alter, by construction of general words, a previous special statute, where the words may have their proper operation without it. These general propositions are so familiar and so well settled that it is unnecessary to quote authority to support them. Applying them to the act of 1875 we are constrained to hold that it does not, either expressly or by necessary implication, repeal the tenth clause of section 629 of the Revised Statutes, under which this suit is brought. To give to the act of 1875 the construction contended for, and to hold that there is no other statute under which the circuit courts of the United States can in any case have jurisdiction, would lead to consequences disastrous in their effects, and which congress could not have had in contemplation. An examination of prior statutes will show numerous provisions under which suits may be brought in particular cases in the circuit courts of the United States, and some, at least, of which could not be maintained under the act of 1875.

The remaining question is whether jurisdiction can be maintained under subdivision 10 of section 629 of the Revised Statutes, which, as we have seen, has not been repealed, and which gives the circuit courts of the United States jurisdiction "of all suits by or against any banking association established in the district for which the court is held, under any law providing for national banking associations."

Counsel for defendant insists that under this statute it is not enough that the suit is brought by a national bank. It must, in his view, also appear that it involves the construction of some provision of the constitution, or of a treaty, or of some law of the United States. Ever since the de-

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cision of the supreme court in the case of *Osborne v. U. S. Bank*, 9 Wheat. 738, it has been taken as settled that it is competent for congress to confer upon a national bank created by it the right to sue in the federal courts by reason of its character as such. An examination of the opinion of Chief Justice Marshall in that case will show that he placed the right to sue upon the simple ground that the bank was chartered by congress. He insisted that the right of the bank to sue at all in any court depended upon a law of the United States; that this question of the right to sue, however clear it might be, and however well settled, was still a question that might be renewed in every case, and therefore one which forms an original ingredient in every case. He said: "Whether it be in fact relied on in the defense, it is still a part of the cause, and may be relied on. The right of this plaintiff to sue cannot be dependent on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things where the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not." This ruling, as I have had occasion heretofore to decide, applies with full force to the construction of the present national banking law. See *Foss v. First Nat. Bank of Denver*, 1 McCrary, 474. In numerous cases in this court it has been taken for granted that the ruling of the supreme court in *Osborne v. U. S. Bank* is conclusive upon this question. See *Bank v. County of Douglas*, 3 Dill. 298, and note.

In the case of *Bethel v. Pahquioque Bank*, 14 Wall. 395, Mr. Justice Clifford, in delivering the opinion of the supreme court, said:

"Jurisdiction in such suits (by or against national banks) is unquestionably vested in any circuit, district, or territorial court of the United States held within the district in which such association may be established."

The decisions of circuit judges in other circuits have been

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to the same effect, and are numerous, but it is not necessary here to cite cases.

Some question has been made as to the right of the plaintiff to sue the defendant Harrison in this district, he being a citizen of the western district of this state. That question is settled by section 740 of the Revised Statutes, which provides that "when a state contains more than one district, every suit, not of a local nature, in the circuit or district courts thereof, . . . if there are two or more defendants residing in different districts of the state, may be brought in either district, and a duplicate writ be issued against the defendants, directed to the marshal of any other district in which the defendant resides."

The motion to dismiss is overruled.

TREAT, *District Judge*, concurring.

GREENWALT v. TUCKER and others.

(*Eastern District of Missouri. September, 1881.*)

1. REVENUE ACTS OF MISSOURI OF MARCH 3, 1872, AND MARCH 21, 1873 — ASSESSMENT OF TAXES.—The Missouri revenue acts of 1872 and 1873 require land situate in St. Louis county to be assessed, not numerically, but alphabetically, in the name of the person owning or holding it, and such person is liable for the taxes thereon.
2. SAME — SAME.—Where a person who has purchased a piece of land gives a deed of trust thereon to secure the purchase money, but remains in possession, he does not cease to be the owner or holder of the property within the meaning of said statutes.
3. SAME — SAME.—Said statutes authorize proceedings against the realty itself.
4. SAME — SAME — EJECTMENT — EFFECT OF A SALE FOR TAXES UPON THE RIGHTS OF PARTIES CLAIMING UNDER A DEED OF TRUST AND CONVEYANCES THEREUNDER.—Where A. bought land from B. and gave his notes for the purchase money, and a deed of trust on said land to secure their payment, and entered into and remained in possession until certain taxes were assessed in A.'s name and levied thereon, under said statutes; and where E., the trustee named in said deed of trust, had, in pursuance of its terms, sold said land,

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after said assessment and levy, to B., because of A.'s failure to pay said notes, and B. had taken immediate possession and thereafter conveyed his interest to other parties; and where said land was thereafter sold for said taxes assessed as aforesaid, and deeds therefor executed and delivered to the purchaser,—*held*, that said tax deeds not only conveyed A.'s interest, but also the interest of all persons holding under said deed of trust and said conveyance to B.

This is an action of ejectment. The plaintiff claims through *mesne* conveyances under two tax deeds, one of which was for the taxes of 1872, assessed on the land in question in the name of Mary A. Musser, under the revenue act of the Missouri legislature, approved March 3, 1872; and the other for the taxes of 1875, assessed against the same land, in the same name, and under the same act, as amended by revenue act, approved March 21, 1873. Mrs. Musser bought said land from Charles Gibson, and gave a deed of trust thereon to secure the purchase money, L. H. Conn being named therein as trustee. The indebtedness to Gibson was evidenced by certain promissory notes, and Mrs. Musser having failed to pay them, the land was sold by said Conn, in pursuance of the liens of said deed, to Gibson, and a deed to him was executed by said trustee, May 3, 1875. Gibson immediately went into possession, and he and his grantees have since held the premises. Defendants claim through *mesne* conveyances under said deed of trust and the deed to Gibson, and contend that said tax deeds only conveyed the interest of Mrs. Musser, and did not affect their title.

Monk & Monk, for plaintiff.

R. Schulenberg and Charles Gibson, for defendants.

McCRARY, *Circuit Judge*.—This is an action of ejectment brought by plaintiff, claiming under a tax title, to recover certain real estate situated in the city of St. Louis. The laws under which the sales and transfer were made are very confused, inasmuch as from the general statutes there are repeated exceptions as to St. Louis county. It appears, however, with sufficient definiteness, that under the acts of 1872

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and 1873, even when analyzed in connection with the act of 1874, that every person "owning or holding property shall be liable for the taxes thereon." See Laws of Missouri, 1873, § 59, p. 95. The agreed case and deeds submitted therewith show that Gibson sold the lots in question to Mrs. Musser and conveyed the same to her by deed, which was properly recorded. It also appeared that at the time of this sale Mrs. Musser entered into possession and remained in possession until after the taxes in controversy were assessed and levied upon the property. At the time of the sale by Gibson to Mrs. Musser, he took from her a deed of trust to one Conn, as trustee, to secure the payment of the unpaid portion of the purchase money and of accruing taxes, etc., with the usual terms of forfeiture.

We are inclined to the opinion that the tax laws in force at the time in the county of St. Louis required the assessment to be made, not numerically, but alphabetically, in the name of the person "owning or holding" the property. Mrs. Musser, by the terms of the conveyance to her, was the owner and holder of the property for the purpose of taxation, subject to defeasance. Hence, the assessment was rightfully in her name. She did not cease to be the owner — certainly she did not cease to be the holder — of the real estate by reason of having executed the deed of trust to recover the unpaid purchase money due to Gibson.

The acts of the general assembly applicable to this case were designed to enforce the collection of taxes through the different means provided, and, in the absence of their payment, they authorized proceedings against the realty itself, which stood charged with the lien therefor, to be enforced through the collector. This property was so charged, and the sale made in compliance with the law, with no defect in the proceedings which invalidates the purchaser's title. It was admitted at the hearing that the rents of the property in controversy have amounted to \$18 per month. The judgment will be for the plaintiff for the possession of the property, and for \$243.60 for rents and costs of suit.

Cable v. Paine & Co. and others.

CABLE v. PAINE & Co. and others.

(District of Iowa. September, 1881.)

1. **EVIDENCE — WITNESSES — PRINCIPAL AND AGENT — IMPLIED AUTHORITY.**— Where the evidence is contradictory and conflicting, it is no error to charge that “where there are witnesses in the case of equal intelligence, and with equal opportunities of knowledge of the facts, some of whom testify to acts done, and conversations and declarations had, giving in detail a full account of such acts, conversations, or declarations occurring in their presence, or done or uttered by them; and others, who testify that they have no recollection that such acts were done, or conversations or declarations uttered—the affirmative testimony is, or ought to be, of greater weight in the minds of the jury than the negative testimony. Nor is there any error in an instruction that a general agent for the sale of manufactured lumber, etc., has no implied authority to enter into contracts for his principal for the sale of timber in the rough.
2. **SAME — LETTER-PRESS COPIES.**— The exclusion of letter-press copies, though no notice to produce the originals had been given, *held* to be sufficient reason for a new trial, where the trial was before a judge, temporarily assigned, and where it is insisted that a rule had been established in the district, with the concurrence of all the judges, making them admissible in evidence without such notice.

On motion for new trial.

Davison & Lane, for plaintiff.

J. C. Bills and *Hubbard, Clark & Dawley*, for defendants.

NELSON, *District Judge*.— This is a suit to recover damages on a contract to sell logs. The contract was made and signed in the name of the defendants by one Idison, who is alleged to have been the duly authorized agent of the defendants to sign such contract. The defendants deny that Idison had any such authority to make or sign the contract, and they also further aver that the contract was signed with the understanding that if not satisfactory to the defendants it should be called off.

The defendants, C. N. Paine & Co., were engaged in the manufacture of pine lumber, flooring, doors, sash, and shin-

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gles, and sawed lumber, at Oshkosh, in the state of Wisconsin. They also had a mill at Merrillon, in that state, and a lumber-yard in the state of Nebraska. Idison was their traveling agent, and there is evidence tending to show that he was selling, outside of the state of Wisconsin, materials, flooring, finishing lumber, as it is called, and also evidence tending to show that he had purchased from Hornby & Cable, on several occasions, sawed lumber and lumber manufactured by them, and that Paine & Co. had paid for the lumber so purchased by Idison. Previous to April 2, 1877, in the latter part of March, Idison was in Davenport, in communication with the plaintiffs, and the result was that he signed to the contract for the sale of logs, and which was offered in evidence, the name of C. N. Paine & Co. The authority of Idison was the chief issue, and the jury rendered a verdict for the defendants.

A motion is made for a new trial. The errors of the charge are urged by counsel to be:

First. In stating that:

“There is a rule which will guide a jury in weighing and giving effect to evidence, and aid them to reconcile evidence which is contradictory and conflicting. It is this: Where there are witnesses in the case of equal intelligence, and with equal opportunities of knowledge of the facts, some of whom testify to acts done, and conversations and declarations had, giving in detail a full account of such acts, conversations, or declarations occurring in their presence, or done or uttered by them; and others, who testify that they have no recollection that such acts were done, or conversations or declarations uttered — the affirmative testimony is, or ought to be, of greater weight in the minds of the jury than the negative testimony. To reject the affirmative testimony you will determine that the witnesses manufactured the evidence which they have given; while, in the other case, the want of recollection that such acts were done, or such conversations or declarations were uttered, may be attributed to the infirmi-

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ties of the human mind. I do not say that this rule is to be followed by juries without deviation; but it may be applied."

It was proper for the court to give this instruction; the rule is elementary, and is thus stated by Starkie on Evidence, vol. 1, p. 578:

"If one witness were positively to swear that he saw or heard a fact, and another were to swear that he was present, but did not hear or see it, and the witnesses were equally faithworthy, the general principle would, in ordinary cases, create a preponderance in favor of the affirmative; for it would usually happen that a witness who swore positively, minutely and circumstantially, to a fact which was untrue, would be guilty of perjury; but it would by no means follow that a witness who swore negatively would be perjured, although the affirmative were true," etc.

This rule was applicable to a portion of the evidence of G. M. Paine, who testified about the conversation had with plaintiff at Merrillon, in November, 1877, when called to contradict the latter, and also to the evidence of Freeman, who was called to contradict Idison.

Second. The next error alleged is in the following instruction to the jury:

"There is no evidence of a direct appointment of Idison as the agent of C. N. Paine & Co., the defendants, giving him, in express language, authority to sell the logs mentioned in the contract, and the logs were not in his possession or under his immediate control at the time the contract was entered into. The plaintiff claims that the fact that Idison was the agent of defendants for the sale of their manufactured lumber outside of the state of Wisconsin, and the further fact that he had purchased sawed lumber from the plaintiff, and had traded for or purchased lumber — or finishing lumber, as it is called — from other persons for his employers, all of which transactions and acts had been recognized by the defendants, gave an implied authority to sell the logs mentioned in the contract, and to enter into it. Such is not the law.

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Authority in Idison to sign the defendants' name to the contract cannot be implied simply from the acts and transactions which I have detailed to you and which are in evidence. It is necessary for the plaintiff to show the acts of Idison with reference to this particular contract, and a recognition of these acts on the part of the defendants, in order to prove that he had authority to sell the logs and to sign the defendants' name to the contract for their sale. The fact that he was their traveling agent for the sale of manufactured lumber, and that he contracted with other persons for the purchase from the defendants of their sawed lumber, is not sufficient evidence for you to imply that he had authority to enter into this particular contract. The acts of Idison with reference to these logs, and the recognition of them on the part of the defendants, must be proved in order to establish his agency to sell the logs and to enter into this contract in the first instance."

I am satisfied this instruction fairly presented the case. An agency is created by (direct) express appointment, or it may be inferred from the relation of the parties, and the nature of the employment, without proof of any express appointment. So says Chancellor Kent, vol. 2, p. 613 (4th ed.).

This question controlled the verdict: Was the contract for the sale of the logs binding upon Paine & Co.? There was no evidence of the express (direct) appointment of Idison to sell them. His authority could only be inferred from the relation of the parties, or proved by the subsequent ratification of the contract. Briefly, the court instructed the jury that the relation of the parties (Idison being defendants' general agent for the sale of manufactured lumber, sash, doors, etc.) did not authorize him to make the contract, and left the question of ratification to the jury, omitting such of the instructions asked not pertinent to the case. Neither abstract questions of law were given, nor the exact language of plaintiff's requests.

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In reference to the claim urged, that defendants, with full knowledge of Edison's act, and with a copy of the contract in their possession, by acquiescence, had ratified it, the court, in substance, said: When information is given of the action of an agent who exceeds his authority, it is the duty of the principal, as soon as possible, to repudiate it. It is not fair dealing, under such circumstances, to reject the contract and not inform the other party (as the plaintiff in this case) of its repudiation. This covered the request asked, and I see no error in the instruction. In fact, I am satisfied with the charge, as a whole, and think the case was fairly placed before the jury, according to the testimony. There is, however, a troublesome feature of the case, and a new trial should be granted.

The plaintiff offered certain letter-press copies of his own letters, containing competent and material evidence. No notice to produce the originals had been given, and they were excluded.

On the trial plaintiff's counsel stated, and now reiterates, that the rule had been established in the Iowa district, with the concurrence of all the judges, "that letter-press copies made at the time of letters written and sent by mail between parties to a suit are not copies in the sense of the rule requiring notice, but are duplicate originals." I declined to recognize any such rule, but offered to withdraw a juror and postpone the trial to the next term; but for some reason the counsel determined to proceed and accept the decision. I was under the impression at the time that the amount involved would permit a writ of error, and the plaintiff, in case of an adverse verdict, could take advantage of this ruling against him. It now appears the judgment of this court is conclusive, and while I am of the opinion that the copies were properly excluded, and if a writ of error could be taken would not disturb the verdict, yet there is a possibility of error in rejecting the evidence. The counsel asseverates that my opinion is in conflict with all the judges of the Iowa

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district. A judgment obtained under these circumstances, and no opportunity to review the decision, is not satisfactory and may be unjust. It makes no difference that the plaintiff rejected the offer to postpone the case. The judgment may be the result of a conflict in opinion between the judge presiding at the trial and the other judges of the court, and the plaintiff unable to ascertain which is correct. A new trial is granted, and it is so ordered.

DAVIS and others v. STEWART, Assignee.

(*District of Iowa. September, 1881.*)

1. FRAUDULENT PURCHASES — ASSIGNEES.— Where a vendee is insolvent at the time a purchase is made, and does not expect to be able to pay for the goods purchased, the vendor is entitled to possession as against such a vendee's voluntary assignee.

An action of replevin is brought to recover the possession of goods alleged to have been fraudulently purchased by Harter & Claus, defendant's assignors. The plaintiffs rescind the sale, and follow the goods, stating in their petition "that when Harter & Claus purchased the bill of goods they were insolvent, and did not expect to pay for the same." The case was tried with a jury, and a verdict rendered for the plaintiffs. Motion is made for a new trial.

Barcroft, Gatch & McCaughan, for plaintiffs.

Parsons & Runnells, for defendant.

NELSON, *District Judge*.—The rule stated by Hilliard on Sales meets with my approval, to wit: "Where the purchaser is insolvent, and has no reasonable expectations or intention of paying for the goods, he gains no title against the vendor." It is not necessary to allege or show false pretense or other direct artifice. When no questions are asked, no

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false pretenses, no artifice resorted to, silence is not fraud; but concealment of insolvency, with no reasonable expectation of paying, renders a sale fraudulent. See *Thompson v. Rose*, 16 Conn. 71, 81; *Johnson v. Monell*, 2 Keyes, 655; *Powell v. Bradlee*, 9 Gill & J. 220, 248, 278; *Talcott v. Henderson*, 31 Ohio St. 162, 52, note, and p. 301.

Donaldson v. Farewell, 93 U. S. 631, is not in conflict with the view expressed in this case. The facts there fully sustained the opinion announced by this court. The point made, that the defendant was an officer of the state court, and the circuit court of the United States has no jurisdiction, is not tenable.

The assignment was the voluntary act of Harter & Claus, and the defendant was their appointee. The property is in the defendant's custody as trustee for the creditors, and the statutory provisions relative to the exercise of the trust are such as a court of chancery would apply.

The evidence was sufficient to justify the verdict, which the court was authorized to put in proper form.

Motion denied, and it is so ordered. Judgment will be entered by the clerk. but without costs.

NAT. BANK OF WINTERSET v. EYRE and others.

(*District of Iowa. July, 1881.*)

1. SET-OFFS—ATTORNEYS' LIENS—JUDGMENTS.—An attorney's lien upon a judgment is subject to any existing right of set-off in the other party to the suit.

In equity.

On the thirtieth of April, 1880, complainant recovered a judgment in the circuit court of Madison county, Iowa, against respondent, Robert Eyre, for the sum of \$2,877. On the twenty-first of October, 1880, the said respondent Robert Eyre recovered judgment in this court against complainant

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for the sum of \$287.12. On the first of November, Wainwright & Miller, attorneys for Robert Eyre, filed their notice under the statute, claiming an attorney's lien upon the last-named judgment for the full amount thereof. Execution having been issued upon the last-named judgment, complainant files this bill alleging the foregoing facts, and prays that proceedings under the same be enjoined, and that the right of set-off be decreed. Respondents demur to the bill.

McCaughan, Dabney & McCaughan, for complainant.

Parsons & Runnells and *Wainwright & Miller*, for respondents.

· *McCRARY, Circuit Judge.*—The right of set-off exists under the statute unless it is defeated by the attorney's lien, claimed by Wainwright & Miller. Code of Iowa, 1873, § 3097. The statute is declaratory of the common law and of the general principle of equity, according to which mutual judgments will generally be set off, the one against the other. 2 Story Eq. Jur. § 1437. Before the respondent Eyre obtained his judgment against the bank he was indebted to the bank on a judgment of over \$2,800. The bank pleaded this judgment as a set-off against his claim in the suit of Eyre against the bank in this court, but a demurrer to that part of the answer was sustained, upon the ground that mutual judgments are to be set off the one against the other after their rendition. Can the right of set-off be defeated by the filing of an attorney's lien? I think not. If Eyre had assigned his entire claim before judgment to Wainwright & Miller, and they had sued on it, I think it clear that the assignment would have been subject to the set-off previously held by the bank. The claim was not negotiable, and the assignees would have taken it subject to any defense existing in the hands of the bank. Surely no greater right can be acquired by the filing of an attorneys' lien than would have resulted from such an as-

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signment. I think the weight of authority, as well as the better reason, supports the rule that the lien of the attorney is upon the *interest* of his client in the judgment, and is subject to an existing right of set-off in the other party. *Gager v. Watson*, 11 Conn. 168; *Ex parte Lehman*, 59 Ala. 631; *Wright v. Treadwell*, 14 Texas, 255; *Currier v. Railroad Co.* 37 N. H. 223; *Mohawk Bank v. Burrows*, 6 Johns. Ch. 317; *Porter v. Lane*, 8 Johns. 277; *Nicoll v. Nicoll*, 16 Wend. 445; *Hurst v. Sheets*, 21 Iowa, 501.

The demurrer to bill is overruled, and unless respondents wish to answer, there will be decree in accordance with the prayer of the bill.

THE J. S. NEIL.

(*Eastern District of Missouri. April, 1881.*)

1. COLLISION—RULE IN ADMIRALTY.—Where there is a collision between two vessels, and one of them is sunk and its cargo lost, and the fault is all on one side, the party owning the vessel in fault must bear all the loss. If both are in fault, the loss and costs of suit are equally divided between the owners of the two vessels.
2. HOW VESSELS SHOULD STEER IN PASSING EACH OTHER.—Where a steamboat, in ascending a stream, has to pass a descending boat, it should keep within the larboard half of the navigable channel, and the descending boat should keep within the other half.

Appeal from the district court of the eastern district of Missouri.

This is an action *in rem*. The Chester Harris Manufacturing Company, a corporation, filed its libel in the district court against the J. S. Neil, a tug-boat owned by the Anchor Transportation Company, of Middleport, Ohio, and alleged that on the thirtieth day of April, 1880, it was the owner of a barge called the Collier No. 1, and a tug-boat called the Hickory; that the barge was being towed up the Mississippi on said day by the Hickory, and was, without any fault on

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the part of the libellant, or its employees or boats, run into and sunk by the J. S. Neil; and that the cargo of the barge was a total loss; and that the collision occurred through the negligence and unskillfulness of the crew of the J. S. Neil. The damages were laid in the sum of \$3,400. The respondent and claimant, the Anchor Transportation Company, set up in its answer that the accident occurred through the negligence of the crew of the Hickory. . There was a decree in favor of libellant in the sum of \$2,355 and costs of suit, from which the respondent and claimant took an appeal to the circuit court. The other facts are sufficiently set forth in the opinion.

Broadhead, Slayback & Haensler, for libellant.

Given, Campbell, and R. H. Kern, for libellee.

McCRARY, *Circuit Judge*.—This is a case of collision, and the question is as to which party was in fault. It is a question mainly of fact, and I have neither the time nor the disposition to discuss at length the evidence. The steamer Hickory was, at the time of collision, proceeding up the Mississippi river, while the J. S. Neil was descending. They collided in the channel nearly opposite the foot of Goose island, about thirty miles above Cairo. It is conceded that, in due time, the pilot of the Hickory gave the usual signal to the Neil to keep to the larboard, which was answered by a signal denoting assent. It was, therefore, the duty of the pilot of the Neil to keep as near as practicable to the island, that being to his larboard. This he did not do, for the collision occurred at least one hundred yards, and probably much more than that, from the shore of the island. It is evident, I think, from the testimony, that the pilot of the Neil, by backing his vessel upon a straight rudder, caused her bow to incline toward the center of the channel, and thus to come into collision with the other vessel. But, whatever the reason may be, the fact is clear that the Neil was not as near to

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the island as she should have been, and was therefore in fault. Was the Hickory also in fault? As to the width of the navigable channel at the place of collision, and as to the distance from the shore of the island to the place of collision, there is much uncertainty in the evidence. It is clear that the main channel runs near the island, but it is also clear that there was at that time good navigable water for a distance of nearly half a mile. The Hickory was bound to give the Neil plenty of room to pass along near the shore of the island and to bear over towards the main shore for that purpose. I think it fair to say that if the Neil had fully one-half of the ordinary channel in which to pass down, she was bound to keep within it. If she was seen further out in time for the pilot of the Hickory to have avoided this collision by bearing still further over towards the main shore, then it was his duty to have done so. But if the pilot of the Hickory so directed his vessel that he believed he was giving the Neil plenty of room, and if but for the sudden turning of the bow of the latter across the channel, she would have had plenty of room, then I think the fault was wholly with the Neil, and this latter seems to have been the fact. By some failure to manage the Neil successfully, while backing her for the purpose of bringing her near the island, her bow was thrown suddenly outward, and being probably caught by the current, she was placed in a position almost at right angles with the channel, and this at a moment too late for the Hickory to change her course and avoid the accident. The pilot of the Hickory had, with good reason, calculated that the bow of the Neil would be kept down stream, and it seems that, if this reasonable expectation had been realized, there would have been no collision.

In reaching this conclusion I give considerable weight to the finding of the board of arbitrators, composed of experts selected by the parties themselves, who, by agreement of parties, heard the testimony and rendered their award in the court below. Their finding ought, at least, to be as persua-

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sive as would have been a similar finding on the facts by the district court, or by a jury, if a jury had been allowed.

Decree of the district court affirmed.

ON REHEARING.

McCRARY, *Circuit Judge*.—Being in doubt upon the first hearing upon the question whether the collision and injury was the result of mutual fault, I granted the petition for rehearing so far as that question was concerned, and, having reconsidered it, I am now prepared to state my conclusions. That the Neil was in fault I have no doubt. If the Hickory was also in fault, it was because she did not bear as far to her larboard as was required under the circumstances. I adhere to the rule expressed on the first hearing, that if the Neil had one-half the channel left to her occupation, that was enough. But in applying this rule in this case, we must consider the condition of the channel as to width and depth at the time of the collision. It is clear that the navigable channel was at that time much wider and deeper than at an ordinary stage of water. The evidence shows that the width of the river from the island to the Missouri shore was half a mile. While it appears that the ordinary channel was only about four hundred yards wide, and ran near the shore of the island, it also appears that at the time of the collision the water was high, and the whole half mile — certainly the greater part of it — was good navigation. The question how much room the Neil was entitled to depends somewhat upon the width of the navigable channel *at that time*. As this was not much, if any, less than half a mile, it seems that the Hickory should have been more than one hundred and fifty yards from the island shore when the accident occurred. If the Neil was entitled to one-half of the width of the channel as it existed on that day, that would have given her at least four hundred yards. Some consideration must also be given to the fact that the Neil was proceeding down stream with a heavy and unwieldy tow, and was, in consequence, somewhat

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difficult of management, as well as to the further fact that the Hickory had ample time in which to have borne over towards the Missouri shore still further, so as to incur no risk of collision.

It must be observed, too, that, even upon the theory that the Neil was entitled to one-half of the ordinary channel (four hundred yards), it is doubtful whether the Hickory was in her proper place. The weight of evidence locates the collision at a point one hundred and fifty yards from the island shore. Assuming that the channel is ordinarily four hundred yards wide, and runs close to the island, this would give the Hickory two hundred and fifty yards, and the Neil only one hundred and fifty yards. My conclusion is that the Neil was in fault for reasons heretofore stated, and that the Hickory was in fault for not bearing further to her larboard, and leaving a wider space between her and the island.

There will, therefore, be a decree dividing the damages and costs. So ordered.

GEORGE v. RALLS COUNTY and another, Garnishee.

(Eastern District of Missouri. September, 1881.)

1. ACT OF FEBRUARY 19, 1875, OF MISSOURI, CONSTRUED — MUNICIPAL BONDS — CONSTITUTIONAL LAW — INFRINGING THE OBLIGATION OF CONTRACTS.— A county levied and collected taxes for the purpose of paying interest on certain bonds issued by it, and thereafter litigation arose as to their validity, and an act was passed by the state legislature authorizing the county court to loan the fund collected, but not specifying the time for which loans might be made. A loan was made for four years to A. Before the expiration of that time a bondholder recovered final judgment against the county, execution was issued, and A. was served with a writ of garnishment. The garnishee answered that the debt from her to the county was not due, and stated the facts. It was *held*: (1) that said act only authorized the county court to invest the fund in question subject to call, or until the litigation was concluded; (2) that, if construed to authorize loans for a longer period, it would infringe the obligation

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of the county's contract with its bondholders, and be unconstitutional; (3) that said funds, when paid into the county treasury, became trust funds for the payment of interest upon said bonds, and that it was the duty of the county authorities to apply them to that purpose as soon as the bonds were held valid; (4) that A. should be presumed to have known the provisions of the statute under which the loan was made, and that the plaintiff was entitled to judgment against her for the sum borrowed, and any interest thereon which might be unpaid.

McCRARY, *Circuit Judge*.—Execution was issued upon a judgment rendered in this court on the twenty-first day of October, 1878, in favor of the plaintiff and against Ralls county. Under that execution Nannie P. Mitchell was served with process of garnishment. The garnishee files an answer, from which it appears that on or about the twentieth day of June, 1880, she borrowed of the county of Ralls \$400, payable four years after date, with interest at the rate of six per cent. per annum, and gave, in payment of such loan, a bond as follows:

“BOND FOR THE PAYMENT OF RAILROAD FUNDS.

“Know all men by these presents, that we, Nannie P. Mitchell, as principal, and E. P. Ralls and George E. Frazer, Jr., as securities, jointly and severally bind ourselves and our respective heirs, executors and administrators to the county of Ralls, state of Missouri, in the sum of four hundred dollars, to be paid to said county for the use and benefit of the St. Louis & Keokuk Railroad interest fund of said county, to the payment whereof, we jointly and severally bind ourselves, our heirs, executors and administrators firmly by these presents. Sealed with our seals and dated the twentieth day of June, A. D. 1880.

“The conditions of this bond are, that whereas the said Nannie P. Mitchell, principal, has this day borrowed from said county the sum of four hundred dollars, belonging to the railroad interest fund of said county, which said sum of money the said principal and securities agree and promise

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to pay to said county, for the use and benefit of railroad interest fund, on or before the twentieth day of June, A. D. 1884, with interest thereon from the date hereof at the rate of six per cent. per annum, said interest to be paid annually on the twentieth day of June of each and every year, until the whole debt shall be fully paid off and discharged; now, therefore, if the principal and sureties shall well and truly pay, or cause to be paid, the said sum of money borrowed, and the interest thereon, according to the tenor and effect of this bond, then this obligation shall be void, otherwise it shall remain in full force. But it is expressly agreed and understood, that all interest not punctually paid when due shall, when due, be added to the principal, and shall bear interest at same rate as the principal until paid; and it is further agreed and understood, as a condition of this bond, that should default be made in the payment of interest when due, or should the said principal to this bond fail to give additional security hereto when lawfully required, in either case both the principal and interest shall become due and payable forthwith."

The answer of the garnishee proceeds to state that said bond was signed, sealed, and delivered by the said garnishee and her said sureties into the hands of the treasurer of Ralls county; that said bond is not due, and the said money borrowed by the said garnishee from said county court of Ralls county is not due; that at the time of the service of the garnishment upon her, she did not owe the defendant any money, nor does she owe the defendant any money now, unless the court shall adjudge that she owes the defendant upon the bond executed as above, and the statement and recitals of facts above made.

Upon the filing of this answer plaintiff moved for judgment upon the ground that it sufficiently appears from the answer, that the money loaned to the garnishee was money which had been paid into the county treasury for the benefit of the St. Louis & Keokuk Railroad interest fund, and therefore money which should now be applied upon the plaintiff's

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judgment, the judgment having been confessedly rendered upon bonds issued to aid in the construction of that railroad. On the other hand, the garnishee insists that she is not liable to pay said loan to the county, or to be required to pay it to plaintiff, until the expiration of the four years within which, by the terms of the bond, she was to make payment.

The fact appears to be that certain taxes were collected by the authorities of Ralls county under a law of the state for the purpose of paying the interest upon certain bonds issued by the county to aid in the construction of the St. Louis & Keokuk Railroad. After the collection of said taxes, litigation arose as to the validity of the bonds, and thereupon the legislature authorized and required the county court to loan or invest the money in the county treasury arising from such taxes. This was done by the act entitled "An act to authorize the several county courts in this state to loan out or invest certain moneys," approved February 19, 1875. Laws of Missouri, 1875, p. 44.

The first section of that act is as follows:

"That the several county courts of this state be and they are hereby authorized and required to loan out any money in the hands of the treasurer of such county collected to pay interest on the bonds of such county issued to any railroad company, and which has not been applied in the payment of such interest, in any case where such bonds are or may be in litigation, or the validity of which is, at the time, being contested by judicial proceedings, at the highest rate of interest that can be obtained, not exceeding ten nor less than six per cent."

It will be observed that the statute does not, in express terms, limit or fix the period for which the funds referred to may be loaned or invested. It is manifest that the funds, when collected and placed in the county treasury, became trust funds for the payment of interest upon railroad bonds, and that it was the duty of the county authorities to apply such funds to that purpose the moment it was determined, by a final adjudication, that the bonds were valid and the

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taxes lawfully levied and collected for their payment. It was proper enough for the legislature to authorize the county authorities to invest the funds pending the litigation, provided they made no contract having the effect of tying them up and keeping them out of reach of the bondholders after the litigation concluded.

If the act of the legislature were construed to authorize the county courts to loan these funds for an indefinite period of time, at their discretion, it would clearly have the effect of impairing the obligation of the contract between the county and the bondholders; for the plain meaning of that contract unquestionably was, that the holders of the bonds were to have a vested right to payment out of any taxes levied and collected and paid into the treasury for that purpose. If the county courts can invest funds of this character for a period of four years, as against a bondholder who may recover final judgment before the expiration of that period, they can invest them for ten, twenty, or forty years, and thus indefinitely postpone the payment of their obligations. The act must, therefore, be construed as authorizing the county courts to invest the funds in question subject to call, or until such period as they may be needed to pay valid and legal obligations, for the payment of which they were raised.

The answer of the garnishee shows that she was fully advised as to the nature and character of the fund which she borrowed, and she must be presumed to have known the provisions of the statute under which the loan was made. It follows that the plaintiff is entitled to judgment against the garnishee, upon the answer as it stands, for the sum of \$400 and any interest which may appear to be unpaid.

TREAT, *District Judge*, concurs.

Overall, *Judson & Tutt*, for plaintiff.

H. A. *Cunningham*, for defendant.

Consolidated Middlings Purifier Co. v. Guilder.

CONSOLIDATED MIDDLEINGS PURIFIER CO. v. GUILDER.

(District of Minnesota. October, 1881.)

1. **LETTERS PATENT — ASSIGNMENT — ESTOPPEL.**— An assignor of a patent, who had agreed to stop manufacturing the patented machines, and had paid a license fee, agreed upon, to his assignee for the privilege of selling machines he had on hand, is estopped from denying its validity, in a suit against him by the assignee for its infringement, by manufacture and sale under letters patent, issued subsequently to the assignment.
2. **SAME — MIDDLEINGS PURIFIERS.**— Reissue No. 8,386, and letters patent No. 225,218, are substantially for the same machine.

NELSON, *District Judge.*— A motion is made upon bill and affidavits for a preliminary injunction *pendente lite*. The defendant resists the application upon affidavits, and since the notice of motion an answer is filed, which, under the rule, is used upon the hearing as an affidavit with the others presented. The bill is filed for an account, and to recover damages for an infringement of certain letters patent, granted for improvements in purifying and dressing middlings, and owned by the complainant, and a permanent injunction is prayed for. The bill of complaint sets up several patents, and charges the defendant with infringing each of them.

The complainant on May 29, 1879, purchased and took an assignment of all patents owned by defendant, among them reissue No. 8,386, under the following circumstances:

“The defendant was manufacturing machines for purifying middlings under letters patent, and the complainant, believing that he was trespassing upon its rights, had an interview through an agent, when a settlement was perfected. The complainant agreed to give \$5,000 for all the patents owned by the defendant, if he would stop manufacturing and quit the business, and also agreed to permit the defendant to sell certain machines he had made, on payment of a royalty, which the defendant accepted. An assignment

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was executed, and delivered to the firm of which the agent was a member, of defendant's patents, which were finally assigned by said firm to the complainant, and the defendant has paid the royalty exacted for the machines on hand, and for some time stopped manufacturing. On March 9, 1880, letters patent No. 225,218, 'for an improvement in middlings purifiers,' was granted defendant, and he commenced to manufacture under this patent, and has been selling machines."

The defendant, in his answer, admits that he made a full assignment of the patents owned by him, including reissue No. 8,386, to the firm of Bennett, Knickerbacker & Co., but denies that he agreed to quit the business of manufacturing purifiers; and also alleges, among other things, that reissue No. 8,386 is invalid, and that the claims therein made by him were expanded beyond the original invention.

It satisfactorily appeared on the hearing that Knickerbacker, who conducted the negotiation with the defendant, was duly authorized to act for the complainant, and that he conducted the same on its behalf; and also that, as a part of the settlement made, the defendant agreed to stop manufacturing, and the payment of royalty for machines on hand is not denied.

On the facts as thus established the defendant, in my opinion, cannot set up as a defense the invalidity of the assigned patents. He was not ignorant at the time of the settlement, and when he made the assignment, of all the facts which are set up in his answer, and he knew of the existence and full mechanism and operation of the machines now alleged by him to have anticipated one, at least, of those assigned the complainant; and, having made the agreement above stated, and paid royalty for license to sell, it would be inequitable to permit such a defense now to be made. He, of course, is free to exercise his inventive genius, and manufacture and sell any improvements for which he may secure letters patent, provided he does not infringe the complain-

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ant's rights. On this motion, in the view taken by the court, the fourth claim only of letters patent reissue No. 8,386 will be referred to in connection with No. 225,218, and the issue of infringement considered, and to do this satisfactorily, and determine whether defendant is a trespasser, an examination of the Guilder patent and reissue is necessary.

Guilder's patent — reissue No. 8,386 — claims:

"(4) The combination, with a reciprocating riddle or shaker of a brush, moving transversely across the entire under surface of the riddle, and independent of the movement of said riddle, substantially as and for the purposes set forth."

In his specifications he states:

"That his invention has relation to machines for purifying flour and middlings, wherein a suction fan and adjustable suction spouts are arranged over a riddle and endless conveyers, arranged beneath the riddle. . . . It also consists in the employment of detachable brush carriers or brush holders, which hold the brushes in contact with the under side of the riddle during the upper part of their revolution."

"It also consists in giving to the said brushes a continuous transverse motion across the bottom of the said riddle."

He afterwards describes the function of the brushes:

"Beneath the riddle, C, is a transverse division, H, which leaves . . . a space, J, on one side of it, for the material, which passes first through the riddle and a space, J prime, for the coarser material, which passes afterwards . . . In each space or compartment (J, or J prime) are single-row dusting brushes, which are arranged to sweep across the bottom of the riddle cloth, from side to side, so that they move at right angles to the material in its passage over the riddle, thus avoiding the mixing of the different grades of the material, and keeping the cloth clear."

This patent is for a new combination of old elements, and the brushes are so arranged that the meshes of the riddle cloth are kept clear, and at the same time the brush, moving

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transversely at right angles to the flow of the material, prevents the mixing of the coarser with the finer middlings. In other previous combinations the brush, moving in the direction of the flow of the middlings, would carry some of the coarser middlings with it and deposit them in the compartment containing the finer middlings.

In Guilder's patent, No. 225,218, issued in March, 1880, which is the machine manufactured, and is alleged to be substantially the old patent, reissue 8,386, with some additional contrivances, he claims:

"(5) The combination of the reciprocating bolt, *Gg*, and transversely moving brush, *K*, having a longitudinal reciprocating motion, substantially as and for the purpose described."

In the specifications he describes the operation of purifying middlings in the machine, and the function of the various contrivances and mechanism used, which it is not necessary to set forth, except what is said about the brush, which is this:

"*K* is a brush longitudinally under the bolt cloth, *g*, the bristles of which are fast in the stock, *K* prime; *k k* are supports to the brush stock; . . . *L* is a transverse guide stock attached to one of the supports, *k k*, and has secured upon its upper edge a corrugated guide plate, *l*, that goes between two friction rollers on downward projecting studs on the under side of brush stock, *K* prime."

This brush stock is attached to endless chains, and travels with them in a transverse direction across the entire width of the bolt cloth in the corrugated or bent guide plate, and so moving gives the brush a longitudinal or endwise motion of several reciprocations while in contact with and sweeping across the bolt cloth, and when a current of air, by means of a suction fan, is passing through the middlings. This motion in two directions, vibratory while in contact with the bolt cloth, is said to be more effective in clearing its meshes from adhering substances.

If it is conceded that the zigzag motion given the brush,

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while moving transversely across the under side of the bolt cloth, makes its operation more effective, and the devise of a corrugated guide renders the brush more serviceable, still the brush, in combination with the reciprocating sieve or bolt cloth in No. 225,218, moves transversely across the under side of the bolt cloth, at right angles to the material, in its passage, and performs the same function, and keeps the cloth clear, substantially as in No. 8,386. The fact that the brush, while crossing, is given what is called a longitudinal reciprocating motion, does not render the combination different from his previous patent. It embodies the substantial idea therein set forth. It may be better to adopt the motion given the brush by defendant, and he may be able to prevent the use by others of his device; but in the use of the combination described, he violates his agreement with plaintiff. The identity of the two patents sufficiently appears; and, although there has been no judicial decision in favor of the validity of reissue No. 8,386, a preliminary injunction must be granted, unless the defendant gives bond in an amount large enough to pay the royalty on each machine manufactured by him, as shall be determined hereafter.

It is so ordered.

R. Mason and J. B. & W. H. Sanborn, for complainant.

Shaw, Levi & Cray and R. C. Benton, for defendant.

POPE and another v. FILLEY.

(Eastern District of Missouri. October, 1881.)

1. CONTRACT OF SALE CONSTRUED — LEX LOCI CONTRACTUS — EVIDENCE, INADMISSIBILITY OF PAROL, TO ADD TO A WRITTEN CONTRACT — BURDEN OF PROOF — EXPERT TESTIMONY — MEASURE OF DAMAGES. — Where a contract of sale was entered into in St. Louis, whereby the vendors agreed to ship the vendee five hundred tons of "No. 1

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Shott's Scotch pig-iron . . . from Glasgow, as soon as possible," and deliver it to him in bond at New Orleans, for \$26 per ton; and they shipped that amount of iron from Leith, and tendered it to the vendee, who refused to accept it, and the vendors thereupon had it sold by a broker for all it would bring, and sued the vendee for damages,—*held*:

(1) That the burden of proof was upon the vendors to show that they had fully complied with the terms of the contract on their part.

(2) That the fact that the iron was shipped from Leith instead of Glasgow was immaterial.

(3) That it was necessary for the vendors to show a compliance with the contract as to time of shipment, but that "shipment . . . as soon as possible" meant as soon as possible by any ordinary mode of transportation.

(4) That parol evidence was inadmissible to show that, by the custom of merchants, shipment should be by sail, unless it is specified that it shall be by steam.

(5) That the term "No. 1 Shott's Scotch pig-iron," as used in said contract, should be understood as having the meaning usually given it by persons engaged in the iron trade in St. Louis.

(6) That evidence was inadmissible to show what, in the opinion of merchants and business men in Glasgow, the contract means.

(7) That the vendors could not recover unless they proved a tender of iron of the quality called for by the contract.

(8) That the only persons who were competent to testify as experts, concerning the quality of the iron, were those who had given the subject of manufacturing and testing iron special attention, and had experience in the art, and had examined the iron in question.

(9) That evidence of the manner in which "No. 1 Shott's Scotch pig-iron" is examined and marked at the foundry, was inadmissible for the purpose of showing the quality of the iron tendered.

(10) That in case the vendors showed a compliance on their part with the terms of the contract, and a refusal on the part of the vendee to accept the iron, the measure of damages would be the difference between the contract price, together with interest thereon from the date of the tender, and the price for which the iron was sold, less the ordinary and usual commission paid brokers for negotiating such sales.

McCRARY, *Circuit Judge*, in ruling upon objections to portions of depositions offered in evidence by the plaintiffs, said:

I have considered the objections to certain portions of the

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depositions of witnesses, sworn on behalf of plaintiffs, and my conclusions may be stated generally as follows:

1. As to shipment "from Glasgow." This is not a condition precedent. If in anywise material it would be an independent covenant, not going to the whole consideration, and for a breach of which an action for damages would lie. But, in my judgment, it is not material. The purpose for which defendant made the contract was to secure, as soon as possible, a given quantity of a given quality of iron.

Whether the vessel carrying it should depart from Glasgow or Leith was immaterial.

2. Shipment "as soon as possible" is a material and important provision of the contract. It required shipment as soon as possible by any of the ordinary modes of transportation. Parol testimony is not admissible to vary the language so that it may read "as soon as possible *by sail*."

Proof of a custom of merchants to ship by sail, unless specifically directed to ship by steam, is not admissible, nor can the plaintiffs be permitted to show by parol what, in the opinion of merchants and business men in Glasgow, the contract means.

3. The quality of the iron cannot be shown by proof of a custom of the foundry as to examining and marking.

It must be shown by the testimony of competent judges who have examined it. To be competent to testify as an expert upon this subject a witness must show that he is skilled in the business of manufacturing iron.

A clerk or book-keeper, although he may have been long employed in an iron foundry, and may have seen the business conducted, is not competent to testify as an expert, unless he shows by his testimony that he has given the subject of examining and testing iron special attention and study, and has had experience in that art.

If it appears that he relies upon the decision of others, or upon the marks on the iron, he is not an expert. Accordingly, the testimony of Lindsey, in so far as he gives his

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opinion as to the quality of the iron, or testifies as to the customary mode of determining the quality, is excluded.

In accordance with these conclusions I have passed upon the several objections to testimony, and have marked them "sustained" or "overruled."

McCrary, *Circuit Judge*, subsequently charged the jury as follows:

Gentlemen of the jury: The counsel, in order to bring this case to a conclusion to-day, have consented that it may be submitted to you without oral argument on the charge which the court shall give you.

Plaintiffs sue the defendant upon a written contract, and allege that the defendant has failed to comply with his obligations as expressed in that contract. The contract is very brief, and is in the following words:

"SALE MEMORANDUM.

"ST. LOUIS, February 20, 1880.

"*Thomas J. Pope & Brother, New York:* Have sold for your account to Mr. O. B. Filley, in St. Louis, 500 tons No. 1 Shott's Scotch pig-iron, at \$26 per ton, cash, in bond at New Orleans; shipment from Glasgow as soon as possible; delivery and sale subject to ocean risks.

"Yours, truly, MILLARD & COMBS."

This is the contract. The contention of the plaintiffs here is, that, in pursuance of that contract, they caused to be shipped the iron mentioned, of the quality described, and within the time required, which iron was, they allege, delivered in New Orleans in bond, in accordance with the agreement, and tendered to the defendant, who refused to take it.

There is no dispute about some of the questions which are involved in this case. The execution of this contract is admitted. The shipment of five hundred tons of iron from Leith to New Orleans is admitted. The tender of this iron to the defendant is admitted, and his refusal to accept is admitted.

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The principal controversy arises upon the question whether plaintiffs themselves have fully complied with the terms of their agreement, and that is the question for you to determine upon the facts in the case, in accordance with the law as the court will give it to you. I say to you, however, as preliminary to that, that if it appears from the proof, to your satisfaction, that plaintiffs did comply with the contract on their part, and that the defendant refused to take the iron after the plaintiffs had so complied, then it was the privilege and the right of the plaintiffs to sell the iron in the market for the best price it would bring, and to charge the defendant with the difference between what it brought in the market and the price which he was to pay for it.

I believe there is no dispute, either, as to the price the iron brought. It was sold, I think, according to the testimony, at \$15 per ton. The price named in this contract was \$26 per ton; so if you find that the plaintiffs did comply with their part of this agreement, in all its material provisions, and that, notwithstanding that compliance, defendant failed to accept the iron when it was tendered to him, your verdict would be for the plaintiffs, and the amount of your verdict would be the difference between the price at which the iron was sold, to wit, \$15 per ton, and the contract price, \$26 per ton; also, in addition to that, the reasonable expenses of the resale, which would be the ordinary and usual commission of the broker, not necessarily the sum that was agreed on between the broker and these plaintiffs, because that would not bind the defendant, but the ordinary and usual commission would be all that could be recovered.

Mr. Hitchcock. There is no dispute about that; I will say two and one-half per cent.

Judge McCrary. Which would be, according to the testimony here, two and one-half per cent. on the amount of the sale; so your inquiry here, gentlemen, must be simply into the question of whether these plaintiffs complied with the contract upon which this suit is brought.

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One of the provisions of the contract is that the iron was to be shipped from Glasgow, and I instruct you, as a matter of law, that that is not a material provision of the contract so far as this controversy is concerned. The purpose of the contract was the sale, by the plaintiff to the defendant, of a certain quality of iron, to be delivered in a certain time, at a certain place, and the fact that it was shipped from Leith instead of Glasgow is not material to the rights of the parties in this case, if the other provisions of the contract were all complied with; so that that provision of the contract need give you no trouble. It is agreed here, and not questioned, that the iron was shipped from Leith instead of Glasgow.

Another provision of the contract is that the iron should be shipped as soon as possible, and upon this there has been some controversy, and it will be for you to decide whether, under the evidence, the iron was shipped by the parties in Scotland, who acted on behalf of these plaintiffs, as soon as possible after the order was received.

The meaning of that clause of the contract is that these parties were to use all reasonable diligence to ship as soon as possible. The time in such a case is of course important, and it was especially important in this case, because the parties saw fit, in their contract, to say that the iron should be shipped as soon as possible; but, if it was shipped by the first conveyance that could be had, and due diligence was used, then that part of the contract has been complied with.

The main controversy is, as you have already seen in the course of the testimony, as to whether the iron which was shipped to New Orleans and tendered to the defendant was of the quality designated and described in the contract, to wit, No. 1 Shott's Scotch pig-iron. Those are the words, gentlemen, which are used in the trade, which are peculiar to the business of the iron merchant. They are not words the meaning of which persons would ordinarily understand. Men who have no knowledge of the business of an iron mer-

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chant, or of the manufacture and sale of iron, would not be able to determine the question of what is meant by No. 1 Shott's Scotch pig-iron. Hence it is that the court has allowed testimony to be offered to you as to the understanding of iron merchants upon this subject, as to the meaning that attaches to these words when they are used in the trade by dealers in iron.

This contract, as you observe, was executed in St. Louis. It must be understood that the parties used these words with the meaning that they have among iron merchants in this city, and you have had a good deal of testimony from the witnesses on both sides as to what is meant by those words — as to what quality of iron is described by those terms. I do not propose to go into a recapitulation of the testimony which has been given to you, but I say to you that it is for you to determine from this testimony what those words mean, as they are understood by iron merchants in St. Louis, and when you have determined that question then you are to inquire and decide whether the iron which was tendered to the defendant came up to and filled the requirement of such description.

If you find that the iron which was tendered was not within this definition, No. 1 Shott's Scotch pig-iron, then it does not fulfill the contract, and the plaintiffs cannot recover. But, on the other hand, if you find from the evidence that the iron was of the description named in the contract, as understood by the merchants here, where the contract was made, then the plaintiff has fulfilled that part of the contract, and is entitled to recover, if you find that he has fulfilled the other portions of the contract.

You have before you, gentlemen, the testimony of a great number of experts on this subject. It would take a great deal of time, and serve no useful purpose, for me to enter into a discussion of the testimony itself. It is for you to take it all and consider it fairly and dispassionately, and determine from it whether the contract in this respect has been

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complied with or not. All that I need to say to you, as a matter of law, is that the burden is on the plaintiff to show that he has complied with the contract, not only with regard to the time of the shipment, but with respect to the quality of the iron which was shipped and tendered to the defendant.

The counsel have suggested some instructions, gentlemen, which I, probably, have anticipated in part, but I will refer to them. And first, on behalf of the plaintiff, I am asked to say to you as follows:

“The jury is instructed that the words, ‘as soon as possible,’ used in this contract, are to be here construed in the ordinary, reasonable sense in which such expressions are used in business. They are to be understood in the light of all the circumstances under which the contract was made, and with reference to the course of trade in shipping iron from Glasgow.”

This clause did not make it obligatory upon the plaintiffs to do everything which was possible as a physical act, if such act lay beyond what shippers of iron might reasonably be expected to do.

So far as the obligation of this clause of the contract is concerned, it is sufficient if the jury find that plaintiffs diligently made every reasonable effort, in the usual course of commerce, to effect the prompt shipment of the iron.

That, I think, is a correct statement of the rule, and substantially what I have already stated to you. Plaintiffs also request me to say to you as follows:

“The court instructs the jury that, under the contract sued upon, it was the right, if not the duty, of the plaintiffs to cause the iron designated therein to be shipped to New Orleans as soon after the contract was made as they could do so by exercising all proper and reasonable diligence and judgment.

“If the jury find that it was impossible for plaintiffs to obtain a vessel from Glasgow, and that it was practicable to obtain one from Leith, and that shipment from Leith was a

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more expeditious way of getting the iron to New Orleans than waiting for a vessel from Glasgow would have been, then plaintiffs were justified in shipping the iron from Leith instead of Glasgow."

That is given as requested.

The defendant's counsel requests the court to instruct as follows:

"The jury are instructed that the contract sued on was an entire contract for the entire quantity of five hundred tons of pig-iron of the description and grade mentioned in the contract, and the defendant was not bound to receive any of said iron unless the entire quantity so contracted for did in fact answer to the description called for by the contract."

Of course, gentlemen, under this contract the defendant was not bound to accept any part of the five hundred tons unless the whole was tendered him. I do not, myself, remember any testimony tending to show that a smaller part was tendered.

Mr. Hitchcock. No, there is no dispute as to that; it is not as to how much was tendered.

Judge McCrary. Very well, sir; I say that is a correct rule, at all events. I say, furthermore, at the request of defendants:

"It is incumbent upon the plaintiffs in this cause, before the jury can find that the plaintiffs did fulfill the conditions of said contract on their part, to prove to the satisfaction of the jury not only that a part of the five hundred tons alleged to have been tendered to the defendant by them under this contract was of the description contracted for, but that the whole of said five hundred tons was of that description. Under the contract sued on it was not incumbent upon the defendant to receive any less quantity than five hundred tons of the description contracted for, and it is incumbent on the plaintiffs, before they can recover for any part of the iron claimed to have been tendered by them to defendant, to

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prove that the whole of said quantity so tendered by them was of the description contracted for."

I give you that instruction, gentlemen, with this qualification, of course: it is not necessary that they should prove that every individual pig was exactly like every other. It is necessary that they should show that the lot, as a lot, came up to the description given in the contract.

It is a question of fact for the jury to determine upon the evidence before them, and under the instructions of the court, what description of iron the parties to the contract sued on meant by the term in the contract, viz., No. 1 Shott's Scotch pig-iron. The contract having been made in St. Louis, Missouri, any local or peculiar terms, or terms peculiar to the iron trade, which may be found in said contract, are to be understood as having whatever meaning was usually given to such terms by persons engaged in the iron trade in that city.

Evidence has been introduced tending to show what is the meaning of that phrase, according to the usages of that trade in this market, and it is for the jury to consider and find upon that evidence what was the meaning of those words, viz., "No. 1 Shott's Scotch pig-iron," as understood by persons engaged in the iron trade in St. Louis. If the jury shall believe from the evidence before them that, according to the usages of persons dealing in and using pig-iron in St. Louis, the words "No. 1 Shott's Scotch pig-iron" were understood by such persons to mean pig-iron made in Scotland, Shott's furnace, and of such grade as should correspond to the grade of Scotch pig-iron commonly described or recognized in this market as No. 1, then the jury cannot find that the plaintiffs fulfilled their part of the contract sued on, unless the jury shall be satisfied, from the whole evidence before them, that the five hundred tons of iron which was offered by the plaintiffs to the defendant on or about the twenty-sixth of May, 1880, was iron made at Shott's furnace in Scotland, and did correspond, as to the grade thereof,

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with the grade of pig-iron usually known in this market as No. 1 when applied to Scotch pig-iron.

If the jury shall find from the evidence, according to the usage of this market, the description of No. 1 Shott's Scotch pig-iron was understood by persons dealing in and using pig-iron as a description of iron such as is last mentioned, and that plaintiffs have failed to prove to the satisfaction of the jury that said five hundred tons so offered to the defendant by them did, in fact, correspond with that description, then the jury should find for the defendant in this case.

That is, gentlemen, only to repeat in substance what I have said to you, that you are to determine from the evidence in this case what quality of iron was called for by that description as understood by iron merchants in St. Louis, where the contract was made, and then you are to inquire and determine whether that quality of iron was tendered to the defendant. If you find for the plaintiffs, gentlemen, your verdict will be for the difference between the contract price of the iron and the price for which it was sold, less the costs of the sale, and interest at six per cent. from the date of the tender, as shown by the evidence.

If you find for the defendant the form of your verdict will be, "We, the jury, find for defendant."

E. Cunningham, Jr., for plaintiffs.

Hitchcock, Lubke & Player, for defendant.

UNITED STATES v. CAHILL.

(Eastern District of Missouri. November, 1881.)

1. PREVENTING CITIZEN FROM VOTING — INDICTMENT UNDER SECTION 5511, REV. ST. — NECESSARY AVERMENTS. — An indictment designed to charge an offense under section 5511 of the Revised Statutes of the United States, for unlawfully preventing a qualified voter from exercising the right of suffrage, should charge the offender with in-

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terfering "at a congressional election" with a voter qualified to vote and offering to vote, for a representative in congress.

2. **SAME — SAME.**—Such an indictment need not set out the facts on which depend the right of the person interfered with to vote.

Demurrer to indictment.

The indictment is as follows, viz.:

"United States of America, Eastern District of Missouri —
ss. In the District Court of the United States in and for the Eastern District of Missouri, at the November Term thereof, A. D. 1880.

"The grand jurors of the United States of America, duly impaneled, sworn, and charged to inquire in and for the eastern district of Missouri, on their oaths, present that heretofore, to wit, on the second day of November, in the year of our Lord one thousand eight hundred and eighty, at the third congressional district of the state of Missouri, a lawful election was held, at which said election a representative for said congressional district, in the forty-seventh congress of the United States, was voted for. That one Alexander Batton, being then and there a duly qualified voter of said state, in said congressional district, and in election district number thirty-nine of the fourth ward of the city of St. Louis, in said congressional district, and then and there entitled to vote at said election district, was then and there proceeding to offer to vote and to deposit his ballot at the polling place in said election district at said election. That Patrick Cahill, late of said eastern district of Missouri, did then and there, while the said Alexander Batton was proceeding to offer to vote and to deposit his ballot at said polling place as aforesaid, by threat and intimidation, unlawfully prevent the said Alexander Batton, a qualified voter as aforesaid, from then and there fully exercising the right of suffrage, contrary to the form of the statute of the United States in such case made and provided, and against their peace and dignity.

"(2) And the grand jurors aforesaid, on their oaths afore-

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said, do further present that heretofore, to wit, on the second day of November, in the year of our Lord one thousand eight hundred and eighty, at the third congressional district of the state of Missouri, within the eastern district of Missouri, a lawful election was held, at which said election a representative for said congressional district in the forty-seventh congress of the United States was voted for. That one Alexander Batton, being then and there a duly qualified voter of said state, in said congressional district, and in election district number thirty-nine of the fourth ward of the city of St. Louis, in said congressional district, and then and there entitled to vote at said election district, did then and there attempt to vote and to deposit his ballot at the polling place in said election district. That Patrick Cahill, late of said district, did then and there, while the said Alexander Batton was attempting to vote and to deposit ballot at the said polling place, as aforesaid, and in the presence and hearing of him, the said Alexander Batton, declare and threaten in substance and to the effect following: That in the event he, the said Alexander Batton, should then vote and deposit his ballot at said polling place, he, the said Patrick Cahill, would cause him, the said Alexander Batton, to be arrested. That by means of said declaration and threat so made as aforesaid, the said Patrick Cahill did then and there prevent said Alexander Batton from voting and depositing his ballot at said polling place, and did then and there thereby prevent said Alexander Batton, a qualified voter as aforesaid, from fully exercising the right of suffrage, contrary to the form of the statute of the United States in such cases made and provided, and against their peace and dignity.

“WILLIAM H. BLISS,

“*Attorney of the United States, Eastern District of Missouri.*”

It was remitted to the circuit court, on motion of the district attorney. The other facts are sufficiently stated in the opinion of the court.

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TREAT, *District Judge*.—The demurrer is special to each of the two counts: (1) The facts on which depended the right of Batton to vote are not set out; (2) there is no allegation that the election was for a representative in congress. The indictment is designed to charge an offense under section 5511, R. S., for unlawfully preventing a qualified voter from freely exercising the right of suffrage, etc.

It is contended by defendant that it is not sufficient in an indictment to charge generally that the person whose vote was refused, or who was prevented from voting, was "a qualified voter," but that the several facts on which his right to vote depended should be set out. Reference has been made to several authorities in support of the proposition. While it may be conceded that where a person offering to vote sues an officer of election for refusing his vote, or where he is the party plaintiff whose right of action is dependent on his legal qualification, he should set out the facts on which his qualification rests; yet that rule does not apply where, as in this case, the defendant is not the voter, but a defendant in a criminal proceeding against him for unlawfully interfering with the voter. It will devolve on the United States at the trial to show affirmatively that Batton was a legally qualified voter, entitled to cast his vote for a representative in congress at the election named, but the detailed facts on which his qualification depends need not be averred in the indictment.

The other ground of demurrer is well taken. True, an indictment, using the same terms, was before the United States supreme court, but its attention was not directed to the point now under consideration, nor does it appear what, in that case, was the full language of the court.

It is clear that no federal statute can interfere with voters, except at an election for representatives in congress, and then only as to their protection in voting for a representative in congress. Hence it is essential that it be charged in the indictment that "at an election for representative," etc., the offense was committed; and it is not sufficient to allege

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that "at an election at which a representative was *voted* for," etc. It may be that the election in question was for some other purpose, over which the federal government had no control, and with which it had no right to interfere. But the defect is still graver when it is averred that at an election where a representative was *voted* for, Batton was a qualified voter, etc., and entitled to vote, and that, when proceeding to offer and deposit his ballot, he was prevented by threats and intimidation; yet nowhere is it alleged that he offered, or proposed, or was about to vote for, or was qualified to vote for, a representative in congress.

It would hardly be contended that because congress may pass a law to control congressional elections and protect voters against unlawful or violent interference with the right to vote for congressional representatives, therefore, whatever occurred at an election which did not interfere with such a right must be considered within the terms of the act, because the words are general, viz.: "Unlawfully prevents any qualified voter of any state . . . from freely exercising the right of suffrage," etc. The language must necessarily be so construed as to confine the provisions of the statute within constitutional limits.

There was a suggestion made by defendant's counsel in argument as to the so-called threat, set out in the second count; but as the special demurrer raises no such point, the court does not pass upon it. It may be that the specific language should be construed as qualifying the general averment; and if, without further averments, the specific language was not an unlawful threat, the indictment would fall.

While it is of great importance that purity of elections and the free exercise of the right of suffrage be enforced in all cases, yet it is equally important that there be no usurpation of jurisdiction, one tribunal with another. So far as the act of congress takes supervision of elections for representatives in congress, there is no difficulty as to federal

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jurisdiction; yet there may be mixed elections, or elections at which local officers alone are to be voted for.

If, at a mixed election, a voter appears to cast his ballot solely for a state or municipal office, and is interfered with in his attempted exercise of that privilege, or if, under the state law, he is qualified to vote for local officers, and not for a representative in congress, and is interfered with, does the act of congress apply? Hence, should not the indictment specify that the election was for a representative in congress; that the voter was qualified to vote for a representative at the time and place averred; that said qualified voter appeared at the polls and offered or attempted to vote for a representative in congress; and that he was unlawfully interfered with in such attempted exercise of that specified right?

If this be not so, then the federal jurisdiction must be held to extend to whatever local elections are held at which any one casts a vote for a representative in congress, whether the election be for that purpose or not; and that if at such an election a vote is cast for such a representative, any one who appears to vote for a local officer cannot have his vote challenged without incurring the penalty of the federal law. These extreme cases are stated to illustrate the position that the indictment must contain needed averments to bring the alleged offense within the constitution and laws of the United States. The court holds that the offense must be charged to have been for interference "at a congressional election" with a voter qualified to vote and offering to vote for a representative in congress.

The demurrer is sustained.

William H. Bliss, for United States.

Marshall & Barclay, for defendant.

Herring v. Gas Consumers' Association.

HERRING v. GAS CONSUMERS' ASSOCIATION.

(*Eastern District of Missouri. March, 1878.*)

1. INFRINGEMENT OF PATENT BY JOINT OWNER.—A part owner of a patent has no right to use an infringing device. If he does he is liable to his co-owner for the wrong done.
2. SAME — AMOUNT OF RECOVERY.—When a part owner of a patent sues a co-owner for using an infringing device, the recovery, if any, will be in proportion to their respective interests.

In equity. Demurrer.

TREAT, *District Judge*.—The plaintiff avers, substantially, that he is owner of an undivided two-thirds interest in the patent described, and that the defendant is owner of the other undivided one-third interest; that the defendant is using a device which is an infringement upon their common patent, and that he is so doing under cover of their common patent. Hence the claim for damages for said infringement,—not for the entire amount thereof, but for plaintiff's proportion, to wit, two-thirds.

The direct question presented is whether an infringer of a patent can escape liability for his infringement because he is a joint owner of the original patent upon which the infringement occurs.

The cases cited do not reach the precise point raised by the bill. It is evident that if a stranger was guilty of the infringement he would be compelled to respond in damages. Can a part owner infringe the common patent and escape all liability? If he can, it is obvious that, however small his aliquot part, he can make the enjoyment of the patent valueless to his joint owner. He has, by virtue of the joint ownership, a right to use the patent, but he has no right, more than a stranger, to infringe the same. If there is an infringement the right of recovery is in the party wronged. All the joint owners should ordinarily be parties plaintiff, but if the wrongdoer is one who is guilty to the damage of the

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other joint owner, the other should not be left remediless. As to such infringement they are strangers. All the joint owners are on the record, and the amount of the recovery determines their respective interests. The infringer cannot escape the consequences of his wrong to his joint owner by averring that he was by his infringement injuring not his joint owner alone, but himself also. In other words, he cannot, *under cover* of his interest in the common patent, shield every wrongdoer who may infringe that patent. He can, as to the other part owners, by infringing, become liable to them for the wrong done. The amount of recovery will be in proportion to their respective interests. Were this not so, the door would be open to the grossest frauds by one joint owner against all other joint owners.

The case of *Pitts v. Hall*, 3 Blatchf. 204, and the comments thereon in Curtis, Pat. § 108 *et seq.*, do not cover this case. The question there discussed pertains to the use by one joint owner of the common property. The difficulties in maintaining an action for an infringement against a joint owner who merely uses the common patent may be insurmountable. As to that no opinion is expressed. In this case an entirely new and distinct proposition is presented, viz.: one of the several joint owners is not using the common patent, but an infringing patent. His defense is, that inasmuch as he had a right to use the original patent without question from his joint owners, under the decision in *Pitts v. Hall*, *supra*, he has a right also to use any infringing patents, on the ground that his right to use the original, being vested in him, his use of other and infringing patents did not cause any wrong or injury to himself as joint owner. In other words, the defendant contends that as one joint owner he could use the common patent without being liable to account to the other joint owners; that he could not be sued as an infringer for using what he had a right to use by virtue of his proprietary interest; and, therefore, if he used an infringing device, he was

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only injuring himself in what he had a proprietary right to forbid.

This would be correct if no interest except his own were involved, for a man may do what he pleases with his own, and "*volenti non fit injuria*" would be, *a fortiori*, applicable in such a case. If a stranger were using the infringing patent this action would unquestionably lie against him; and the question before us is whether it will lie against a joint owner, or, in the language of the bill, whether he, under cover of his joint ownership, can infringe and escape liability. So far as he acts outside of his interests or rights or powers as a joint owner, there is no adequate reason for treating him, *quoad hoc*, otherwise than as a stranger. If this be not so, then one joint owner may destroy, without remedy, the rights of the other joint owners.

Demurrer overruled.

J. H. Blair, for plaintiff.

H. B. Wilson and *John McGuffey*, for defendant

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KEEP v. UNION RAILWAY & TRANSIT CO.

(*Eastern District of Missouri. October, 1881.*)

1. COMMON CARRIERS — NEGLIGENCE. — Where two or more railroads, by an arrangement between themselves, establish a route to a certain point, and contract to carry a passenger over their roads to the terminal point, the terminal road is liable to him, as a common carrier, if, while being conveyed by it to his destination, he is injured, either through the negligence of its immediate employees or others with whom it has contracted for motive power or other service.
2. SAME — LIABILITY OF PARTY FURNISHING MOTIVE POWER TO A RAILROAD. — A corporation furnishing motive power to a railroad company, but not acting, or chartered to act, as a common carrier, is not bound to use more than the ordinary skill and diligence which its

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employment needs, and is only liable for direct negligence or unskillfulness.

3. **SAME—SAME.**— Where a common carrier employs another party to furnish motive power, and through the direct negligence of the latter, a passenger, being conveyed by the carrier, is injured, and the carrier is also at fault, and the passenger brings a suit against each party, and both suits are tried together, the same amount of damages should be rendered against each. Under such circumstances the satisfaction of the judgment in either case should be made to operate as a satisfaction in both.
4. **SAME—SAME—MEASURE OF DAMAGES.**— A party who receives a physical injury through the negligence of another, should be allowed sufficient damages to compensate him for the amount of his expenditures and losses in consequence of the injury, taking also into consideration the extent of his injuries, his sufferings, and the effect of the accident on his general health.

The above-entitled cases were, by order of the court, tried together.

In the case against the Indianapolis & St. Louis Railroad Company the plaintiff alleged in his petition that the defendant was a common carrier of passengers over a railway extending from the city of Indianapolis, in the state of Indiana, to the city of St. Louis, in the state of Missouri; that for a valuable consideration it contracted to convey him as a passenger carefully and safely from Indianapolis to said city of St. Louis; that while he was in a car of the defendant, and was being transported under said contract, the defendant negligently, carelessly, and unskillfully managed and handled said car so that it was violently thrown off the track and overturned, by reason whereof he received serious bodily injuries and suffered greatly, both mentally and physically, and was forced to pay out large sums of money. For all of which he asked damages in the sum of \$50,000.

The defendant put in a general denial.

In the case against the Union Railway & Transit Company of St. Louis, the plaintiff alleged that the defendant was a common carrier of passengers for hire in cars drawn by steam power over a certain railway extending from a point

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in the city of East St. Louis, in the state of Illinois, to a point in the city of St. Louis, in the state of Missouri, over a bridge across the Mississippi river, which railway said defendant controlled and managed; that while the plaintiff was lawfully in a car under the control and management of the defendant, on said railroad in the city of East St. Louis, to be transported as a passenger by defendant to said city of St. Louis, in the state of Missouri, and while it was the defendant's duty to carry him safely over the road to said city of St. Louis, Missouri, said car was, through the carelessness and unskillfulness of the defendant, thrown from the track of said road; and that in consequence the plaintiff was greatly injured, etc. In this case, also, the plaintiff asked for \$50,000 damages.

The defendant denied that it was a common carrier, and also denied all the other material allegations of the petition.

The cases were tried before a jury.

The evidence introduced tended to prove the following facts:

In December, 1878, the plaintiff purchased a through ticket from New York to St. Louis, Missouri, one of the coupons of which called for a passage over the Indianapolis & St. Louis Railroad.

Before reaching East St. Louis the conductor of the train took up the coupon of plaintiff's ticket covering the ride from Indianapolis to St. Louis, Missouri, and gave plaintiff a ticket or check entitling him to ride from East St. Louis over the bridge and through the tunnel to the place of his destination — St. Louis, Missouri. There was a contract between the railroad company and the Union Railway & Transit Company by which the last named company hauled all the cars of the former between St. Louis and East St. Louis, back and forth, for a specified consideration; the track of the Indianapolis & St. Louis Railroad Company not extending beyond East St. Louis. Trains going westward were delivered to the Union Railway & Transit Company at St. Louis.

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The track of the Ohio & Mississippi Railroad Company crosses the tracks of the Union Railway & Transit Company in East St. Louis about four hundred feet north of the Relay depot, at right angles. At this crossing a watchman in the employ of the latter company is constantly stationed. The morning of the accident the train of the Indianapolis & St. Louis, consisting of one baggage car, two passenger coaches and a sleeping car, pulled across the track of the Ohio & Mississippi about ten or fifteen feet and then stopped. At the time this was done a gravel train was standing on the track of the Ohio & Mississippi, waiting to come over the crossing. The engine of this gravel train was on the west end of it, and when the passenger train of the Indianapolis & St. Louis had cleared the crossing the watchman stationed there gave the signal to the gravel train to start. Accordingly that train was put in motion and began approaching the crossing, which was about one hundred and fifty feet from its first gravel car.

As soon as the passenger train stopped, the Indianapolis & St. Louis engine that had been hauling it was cut off and moved away to the round-house; then the engine of the Union Railway & Transit Company backed up from a switch and attempted to couple on to this passenger train. In doing so it pushed the train backward, so that the rear end of the sleeper in which plaintiff was riding was over the crossing down which the gravel train of the Ohio & Mississippi was moving, and a collision ensued, the sleeping car was thrown over and wrecked, and the plaintiff, who was riding in it as a passenger, received the injuries sued for. At the time of the accident the train had not reached the Relay depot in East St. Louis, where its passengers are discharged for that station.

L. B. Valliant and Joseph Dickson, for plaintiff.

John T. Dye, for I. & St. L. R. Co.

S. M. Breckenridge, for U. R. & T. Co.

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TREAT, *District Judge (charging jury.)* — These two cases have been tried at the same time, yet each is a separate case, to be determined on the law and facts applicable thereto, requiring a distinct verdict. The plaintiff alleges that he received a through ticket from New York to St. Louis, one of the coupons of which called for passage over the Indianapolis & St. Louis Railroad; that said coupon ticket was taken up while he was on said road, by the conductor or some other officer thereof, and in lieu thereof he received a bridge and tunnel ticket to St. Louis; that while in East St. Louis, on the train bound for St. Louis, he was injured through the negligence of the defendant railroad, for which injury he claims damages.

If the said railroad was one of several, whereby a continuous through route from New York to St. Louis was established by an arrangement among themselves, and the defendant railroad was the terminal road at St. Louis, with bridge and terminal arrangements for itself, and if the injury complained of happened at East St. Louis, through the negligence of the defendant, either acting directly through its immediate employees or acting by other agents with whom it had contracted for intermediate service, then said railroad is liable.

The various matters presented in evidence concerning the relations of the Indianapolis & St. Louis Railroad and the Union Railway & Transit Company call upon the court to determine, as a question of law, whether — *First*, the liability of the Indianapolis & St. Louis Railroad ceased, as a common carrier, at or before the time of the accident; and *second*, whether the Union Railway & Transit Company had at that time imposed upon it, also, the duties of a common carrier.

The duties of the Indianapolis & St. Louis Railroad Company to the plaintiff as a common carrier, if the facts are as alleged, did not cease until the arrival of the train at St. Louis, although it may have entered into a contract with

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others to furnish the motive power for hauling the train over the bridge and tunnel. If it was not one of the connecting roads for a through route, its liability ended at the termination of its route.

As to the Union Railway & Transit Company, its liabilities are not those of a common carrier. It had entered into no personal contract with the plaintiff, unless it was one of the common carriers in the through route. But the charter of the latter company does not make it a common carrier as to operations in East St. Louis, nor do any of the contracts produced. Hence, the Union Railway & Transit Company is not liable to the plaintiff for any injury sustained, unless it was guilty of direct negligence or unskillfulness, causing the said injury. If that company did, through such negligence or unskillfulness, cause the injury alleged, it must respond in damages; otherwise, not.

Thus, the jury will decide—*First*, did the plaintiff sustain any injury; and, if so, what is the amount of damages to be awarded him. *Second*, whether the injury was sustained by the plaintiff from the negligence of the Indianapolis & St. Louis Railroad, or from the negligence of its agents. *Third*, as the liability of the Union Railway & Transit Company rests upon the degree of negligence of which it was guilty, whether its direct negligence or unskillfulness caused the injury. It was bound, not to the extraordinary diligence required of a common carrier, but to the ordinary diligence and skill which its employment needs.

It must be understood that, so far as the plaintiff is concerned, his cause of action may be against one or both of the defendants, although he will ultimately be allowed to receive compensation only once.

If the plaintiff is entitled to recover, the amount of damages to be allowed must be sufficient to compensate him for the amount of expenditures and losses by him sustained in consequence of such injury, taking also into consideration the extent of his injuries, the sufferings by him undergone therefrom, and the effect of the accident on his general health.

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The jury, through their foreman, informed the court that they had agreed upon damages, and wished "to know whether a judgment against both companies will hold, or can it be assessed against one through the negligence of its agents."

TREAT, *District Judge*.—If each company is at fault, the same amount of damages should be rendered against each.

The jury found a verdict for the plaintiff, and awarded him \$7,500 damages against each defendant, and the court ordered that the satisfaction of the judgment in one case should operate as a satisfaction in both.

NOTE.—It seems clear that the questions of law arising upon the foregoing facts were, on the whole, correctly put to the jury by the learned and experienced judge who presided at the trial, and with the terseness and brevity which is his habit.

1. In the first place, assuming that the plaintiff was injured through some failure or fault in the means of transportation employed in carrying him from East St. Louis to St. Louis, there is no doubt of the liability of the Indianapolis & St. Louis Railway Company; for his contract was with this company. The recognized American doctrine with reference to the contract for the carrying of passengers which is evidenced by the ordinary railway coupon ticket is, that it is a distinct contract with each carrier who, under it, undertakes the service of carrying the purchaser of the ticket. *Chicago, etc. R. Co. v. Fahey*, 53 Ill. 81; *Kessler v. New York, etc. R. Co.* 61 N. Y. 538; *Milnor v. New York, etc. R. Co.* 53 N. Y. 363; *Knight v. Portland, etc. R. Co.* 56 Me. 234; *Brook v. Grand Trunk R. Co.* 15 Mich. 332. The principle on which the American courts proceed in so holding is, that the company which sells the coupon ticket over its own and connecting roads acts as the agent of the connecting companies for the purpose of making the contract of carriage over their roads. In this respect the English courts differ from the American. The former courts hold that such a contract is a contract with the first carrier—the carrier who sells the ticket, only; and that there is no privity between the passenger and the other carriers. The first carrier undertakes the service for the entire transit, and the others are but the agents of the first to carry out the undertaking; and hence, for any nonfeasance in carrying it out, they are, upon well settled grounds, liable, not to the passenger, for they are not in any privity of contract with him, but to the first carrier, for whom they have undertaken the service. Hence, in the case of *loss of baggage* of the passenger, under the English rule, the company selling

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the ticket alone is liable, although the baggage may have been lost on the line of one of the connecting carriers. *Mytton v. Midland R. Co.* 4 Hurl. & N. 615; S. C. 28 L. J. (Exch.) 385. Whereas, under the American rule, either the company selling the ticket, or the carrier losing the baggage, would be liable.

But a direct injury to the passenger stands on a different footing from the loss of baggage. Here the passenger has, both under the English and the American doctrine, an action against the carrier on whose line the injury was received. It is a case of the breach of a contract, and also a case of mere tort; for the passenger would have an action although there were no contract, and the undertaking to carry him were gratuitous. *Phila. & Reading R. Co. v. Derby*, 14 How. (U. S.) 468; *Steamboat New World v. King*, 16 How. (U. S.) 469; *Todd v. Old Colony R. Co.* 3 Allen, 18; S. C. 7 Allen, 207; *Rose v. Des Moines Valley R. Co.* 39 Iowa, 246; *Jacobus v. St. Paul, etc. R. Co.* 20 Minn. 125. The subsequent carrier having invited or permitted the passenger to travel on its train, is bound to make reasonable provision for his safety; and for a failure of this duty the passenger may maintain an action against it as for pure tort. *Berringer v. Great Eastern R. Co.* 4 C. P. Div. 163; *Foulks v. Metropolitan Dist. R. Co.* id. 267; *Johnson v. West Chester, etc. R. Co.* 70 Pa. St. 357. It has always been the law that a carrier who has inflicted an injury on a passenger may be sued in tort. *Ansell v. Waterhouse*, 2 Chit. 1; S. C. 6 Maule & Selw. 885; *Bretherton v. Wood*, 6 J. B. Moore, 141; S. C. 3 Brod. & Bing. 54; *Bank of Orange v. Brown*, 9 Wend. 158; *McCall v. Forsyth*, 4 Watts & S. 179; *Pa. R. Co. v. The People*, 31 Ohio St. 537; *Heirm v. McCaughan*, 32 Miss. 17; *Cregin v. Brooklyn, etc. R. Co.* 75 N. Y. 192; *Saltonstall v. Stockton*, Taney's Decis. 11; *Frink v. Potter*, 17 Ill. 506; *New Orleans, etc. R. Co. v. Hurst*, 36 Miss. 660; *Ames v. Union R. Co.* 117 Mass. 541. With the case of *Dale v. Hall*, 1 Wilson, 281, the practice of declaring in *assumpsit* succeeded; but this practice did not supersede the practice of suing in trespass or in case (Bayley, J., in *Ansell v. Waterhouse*, 2 Chit. 1; S. C. 6. Maule & Selw. 885); and the passenger has his election to sue for the tort, or to waive the tort and sue for the breach of the contract to carry him safely. Taney, C. J., in *Saltonstall v. Stockton*, Taney's Decis. 11; *Frink v. Potter*, 17 Ill. 406. If he sues in contract, he can only sue the carrier with whom he made the contract; and here is where the difficulty arises in American courts. The courts, English and American, almost universally hold that he may sue the first carrier, who, in cases of a contract like the one in the principal case, is generally deemed to undertake for the safe carriage of the passenger and his baggage over the entire route embracing the connecting lines. *Great Western R. Co. v. Blake*, 7 Hurl. & N. 987; S. C. Thomp. Carriers of Passengers, 408; *Buxton v. Northeastern R. Co.* L. R. 3 Q. B. 549;

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Kent v. Midland R. Co. L. R. 10 Q. B. 1; S. C. 44 L. J. (Q. B.) 18; *Mytton v. Midland R. Co.* 4 Hurl. & N. 614; S. C. 28 L. J. (Exch.) 385; *Najac v. Boston, etc. R. Co.* 7 Allen, 329; *Illinois, etc. R. Co. v. Copeland*, 24 Ill. 387; *Wilson v. Chesapeake R. Co.* 21 Gratt. 654; *Williams v. Vanderbilt*, 28 N. Y. 217; S. C. 29 Barb. 401; *Hart v. Rensselaer, etc. R. Co.* 8 N. Y. 87; *Burnell v. New York, etc. R. Co.* 45 N. Y. 184; *Weed v. Saratoga, etc. R. Co.* 19 Wend. 534; *Candee v. Pa. R. Co.* 21 Wis. 582; S. C. Thomp. Carriers of Pass. 419; *Carter v. Peek*, 4 Sneed, 203. It has been supposed, however, that extrinsic evidence is admissible to show the real nature of the contract, whether the first carrier did, in fact, assume to carry the passenger for the entire distance called for by the ticket or tickets. This proceeds upon the idea that the ticket is not a contract, but a mere token, and that its meaning may well be explained by parol. *Quimby v. Vanderbilt*, 17 N. Y. 306. A similar view obtains in Tennessee. *Nashville, etc. R. Co. v. Sprayberry*, 9 Heisk. 852; S. C. 1 Cent. Law J. 541. But this view is questionable. It is no doubt true as a fact that nearly all the American railways have running connections with each other, so that one railway company will issue tickets at any principal city, which will be good over any intermediate connecting road which it may name to any other city in the country. It should seem that the law ought to affix a definite meaning to a practice which has become so general and so uniform, and not leave the rights of the traveling public to the sport of parol testimony.

But it may be inconvenient for the passenger who has sustained damage through the failure of the last connecting carrier to perform its part of the understanding, to go back to the place of starting and sue the first carrier for a breach of the contract to carry. Some courts have, therefore, adopted the view that in a contract such as that in the principal case, the carrier selling the tickets is but the agent of the other connecting carriers to sell tickets for them and account to them for the proceeds. *Knight v. Portland, etc. R. Co.* 58 Me. 235; *Furstenheim v. Memphis, etc. R. Co.* 9 Heisk. 852; S. C. 1 Cent. Law J. 541; *Hood v. New York, etc. R. Co.* 22 Conn. 1. But this conflict of view is of little importance where the passenger's cause of action is a personal injury. In such cases he now sues in tort, especially as he may be able to get exemplary damages in this form of action, which he could not have if suing in contract. It is only in case of the carriage of goods, or in case of the loss of a passenger's baggage, that the question becomes important. In the former case, as pointed out by a recent able writer, the American courts generally limit the liability of the carrier, in the absence of special contract, to its own line. Lawson, Carriers, § 240. In the latter case, the rule is that the loss falls on the particular carrier in whose hands the baggage was lost; that is to say, whatever may be the liability of the carrier selling the ticket, each of the con-

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necting carriers, whose conductor or other proper agent recognizes the ticket and undertakes to carry the passenger in pursuance of it, becomes responsible for the safe carriage of his baggage in case it comes into his hands. *Chicago, etc. R. Co. v. Fahey*, 52 Ill. 81. But the connecting carrier would not be responsible without proof that the baggage did come into his possession. *Kessler v. New York, etc. R. Co.* 61 N. Y. 538. See *Milnor v. New York, etc. R. R. Co.* 53 N. Y. 363.

2. The fact that the injury to the plaintiff might have been the result of the negligence of the Union Railway & Transit Company clearly would not alter the liability of the Indianapolis & St. Louis Railroad Company; for the latter had constituted the former their agent to complete the transit. In such cases, the general rule is that the carrier who uses the line and means of transportation of another company is responsible for the negligence of such other company. "Railway companies," said Lord Cockburn, "ought, at least, to use due care to keep the line over which they contract to carry passengers in a safe condition. There is no doubt that this is the obligation which attaches to a railway company which undertakes to convey passengers through the whole distance of their line; and if, by arrangement with another company, they convey passengers over the whole or part of another line, the same obligation attaches, and they make the other company their agent, and on their part they undertake that the other company shall have their line in proper condition." *Great Western R. Co. v. Blake*, 7 Hurl. & N. 992; S. C. Thomp. Carriers of Pass. 403. "A company," said Lush, J., in another case, "undertaking to carry passengers over another line is answerable for negligence happening on it, just as much as if it happened on their own line." *Buxton v. North Eastern R. Co.* L. R. 3 Q. B. 549, 554. So, in the supreme court of New Hampshire, it has been said: "By using the railroad of another corporation as a part of their track, whether by contract or mere permission, they would ordinarily, for many purposes, make it their own, and would assume towards those whom they had agreed to receive as passengers all the duties resulting from that as to the road; and, if accident resulted to such passengers from any failure of duty of the owners of the road, for which they would be responsible if the road was their own, their remedy over would be against the owners." *Murch v. Concord R. Co.* 29 N. H. 35. To the same effect are *Seymour v. Chicago, etc. R. Co.* 3 Biss. 43; *John v. Bacon*, L. R. 5 C. P. 437; *Peters v. Rylands*, 20 Pa. St. 497; S. C. 1 Philadelphia, 264; *McLean v. Burbank*, 11 Minn. 277. So far as we know, the only contrary American decision is one in which the opinion was delivered by Judge Redfield, decided in 1857. *Sprague v. Smith*, 29 Vt. 421. Notwithstanding the eminent character of the judge who wrote the opinion, it is obviously unsound, and opposed to the entire weight of authority, English and American.

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3. A more interesting question relates to the right of action which the plaintiff had against the Union Railway & Transit Company. Aside from any questions of imputed negligence — that is, contributory negligence of the passenger's own carrier,—under what circumstances, if any, has he a right of action against a carrier with whom he is in no privity of contract, and who acts simply as the agent of the carrier which has undertaken to carry him? This question has been mooted in several cases where it was unnecessary to decide it, because the passenger had brought the action against his own carrier. Martin, B., in *Birkett v. Whitehaven Junction R. Co.* 4 Hurl. & N. 730, 737; Crompton, J., in *Great Western R. Co. v. Blake*, 7 Hurl. & N. 987, 994; Bramwell, B., in *Wright v. Midland R. Co.* L. R. 8 Exch. 137, 143; Bell, J., in *Murch v. Concord R. Co.* 29 N. H. 9, 35. The answer is simple. He has the same right of action that a passenger would have for a personal injury against a stage-driver who was not the proprietor of the means of transportation. For an act of nonfeasance on the part of one who is the agent or servant of another — that is, a mere failure to perform the duties of his agency or service,—a stranger has no action against the agent or servant, because the latter has failed in duty only to his principal or master. *Hill v. Caverly*, 7 N. H. 215. But if the servant or agent, whether executing the orders of his master or principal or not, does a positive act of misfeasance or trespass, whereby another person is injured, he is liable to an action therefor by the person injured. *Harriman v. Stowe*, 59 Mo. 93; S. C. 2 Thomp. Neg. 1057; *Moore v. Suydam*, 8 Barb. 358; *Wright v. Compton*, 53 Ind. 337. In some cases the principal and agent may be jointly sued; because if one commands a trespass and another executes it, both are principals (*Hewett v. Swift*, 3 Allen, 420; S. C. 10 Am. Law Reg. 505; *Whittamore v. Waterhouse*, 4 Car. & P. 383, per Parke, J.); and there seems no difficulty about this under the codes. *Montfort v. Hughes*, 3 E. D. Smith, 591; *Phelps v. Waite*, 30 N. Y. 88; *Suydam v. Moore*, 8 Barb. 358; *Wright v. Compton*, 53 Ind. 337. See, also, *New Orleans, etc. R. Co. v. Bailey*, 40 Miss. 395; *Fletcher v. Boston, etc. R. Co.* 1 Allen, 9; *Illinois, etc. R. Co. v. Kanouse*, 39 Ill. 272.

Whether the learned judge in the principal case was right in directing the jury that the Union Railway & Transit Company was not a common carrier need not be discussed; because it is conceived that its liability would be the same for an injury to a person while hauling him over its road, whether it be called a common carrier or not. Any debate about degrees of negligence in such a case would be misleading; for “when carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they should be held to the greatest possible degree of diligence. . . . Any negligence in such cases may well deserve the epithet of gross.” *Phila.*

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& *Reading R. Co. v. Derby*, 15 How. (U. S.) 488; *Steamboat New World v. King*, 16 How. (U. S.) 469. The Union Railway & Transit Company may not be technically a common carrier; but in the prosecution of its business it has the custody of human beings, and the care of their lives, exactly as it would have if it were a railway common carrier, and unquestionably it is subject to the same obligation of care in the prosecution of its business. In *Schopman v. Boston, etc. R. Co.* 9 Cush. 24, it was ruled that a railroad company which receives on its track the cars of another company, placing them under the control of its own agents and servants, and drawing them by its own locomotives, over its own road, to their place of destination, assumes towards the passengers coming upon its road in such cars the relation of a common carrier of passengers and all the liabilities incident to that relation.

ST. LOUIS.

SEYMOUR D. THOMPSON.*

BREWIS v. CITY OF DULUTH AND VILLAGE OF DULUTH.*(District of Minnesota. December, 1881.)*

1. **EQUITABLE RELIEF — TWO MUNICIPAL CORPORATIONS FORMED OUT OF ONE — CREDITOR'S BILL.**— The rights of creditors of the city of Duluth considered, with reference to the act of the legislature of the state of Minnesota, by which the village of Duluth was created out of a part of the territory of the city of Duluth, and the indebtedness of the city apportioned between them, and the allegations of fact in plaintiff's bill, and *held*, that such act—such allegations being true—interferes with the rights of creditors, and that a bill in equity will lie, by a creditor of the city at the time the act was passed, against the village, to enforce the payment of its proportionate share of the indebtedness; the share of the indebtedness for which each is liable being in the ratio of the taxable property of one to that of the other.
2. **SAME RIGHTS AGAINST ORIGINAL CORPORATION.**— Where a city creates a debt, and is thereafter by statute deprived of a part of its territorial extent by carving a new town or city out of the old, the old corporation remains liable for its debt, and must enforce it against the property left subject to its power of taxation; and while it is true that where the debtor corporation is shorn of population and taxable property to such an extent that it cannot pay its debts, a court of equity may enforce payment by the new corporation carved out of the old, yet if the latter remains able to pay, the creditor must proceed against it alone, unless the law otherwise provides.

*In *Federal Reporter*.

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In equity. Demurrer to bill of complaint.

This suit is brought against the city of Duluth and the village of Duluth to recover the coupons overdue upon bonds of the city of Duluth, in this district. A demurrer is interposed by the village of Duluth.

Gilman & Clough, for demurrer.

Williams & Davidson, contra.

NELSON, *District Judge*.—The complainant is the owner of certain bonds issued under an act of the legislature of Minnesota, approved March 8, 1873, authorizing the city of Duluth to fund the debt previously incurred for improving the harbor, and for other purposes. The bonds were payable in not less than twenty nor more than thirty years from the date of their issue, and bear interest at the rate of seven per cent. per annum, payable semi-annually in the city of New York. The complainant became a *bona fide* holder of the bonds and coupons previous to 1875.

It appears that on February 23, 1877, the legislature of the state of Minnesota created the village of Duluth out of a part of the territory of the city of Duluth, under an act entitled "An act to create the village of Duluth, . . . and to apportion the debts of the city of Duluth between itself and the village of Duluth, and provide for the payment thereof."

This act carved the village out of the city limits, taking and embracing in the village all the business part of the city and business houses, the harbor, railroad depots and tracks, nearly all the dwelling houses, all the population except about one hundred inhabitants, and nineteen-twentieths of all the taxable property; and no provision was made for the payment of the debts of the city by the village unless creditors would accede to the terms imposed by the legislature as hereinafter stated. It also appears that on February 28, 1877, an act was passed entitled "An act to amend the act

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entitled 'An act to incorporate the city of Duluth,' approved March 5, 1870, and this act declared that the service of all summons and process in suits against the city of Duluth should be made on the mayor of the city, and that service made on any other officer should not be valid against the city. It also provided that the term of the office of mayor should cease on the following April, 1877, and no provision was made for the election of a successor or for filling a vacancy; that no taxes should be levied without the affirmative vote of all, to wit, four aldermen; and since the passage of the act there have never been four aldermen in the city qualified to act. There is a section authorizing the levy of taxes by the county of St. Louis, in which the city is situated, but all taxes thus levied and collected must be paid to the village of Duluth.

On the facts admitted by the demurrer the complainant is entitled to relief. The legislature undoubtedly had the right to create the village of Duluth out of the territory of the city, and, as between the city and the village, apportion the existing indebtedness; but when the corporation which created the debt is shorn of its population and taxable property to such an extent that there is no reasonable expectation of its meeting the present indebtedness, and it is unable so to do, the creditors, at least, can enforce a proportionate share of their obligations against the two corporations carved out of one. Both are liable to the extent of the property set off to each respectively.

The debt of the city at the time the village was created by act of February 23, 1877, was about \$400,000, and the act creating the village of Duluth authorized an apportionment of the debts as follows:

Section 3, in substance, provides that after one year from February 23, 1877, the village shall become jointly liable with the city on all bonds issued prior to the passage of this act, unless it shall within the year take up and cancel, as hereinafter provided, \$218,000 of the evidence of indebted-

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ness outstanding of the city, provided that interest to January 1, 1878, on all bonds and maturing coupons shall be treated and regarded as part of said evidence of outstanding indebtedness.

Section 4 enacts that not more than \$100,000 of village six per cent. thirty-year bonds shall be issued for taking up outstanding bonds and orders of the city of Duluth to the amount of \$218,000, and interest thereon to January 1, 1870. These bonds are to be placed in the possession of the judge of the eleventh judicial district of the state of Minnesota.

Section 5 enacts that persons holding bonds, matured coupons, or orders of the city of Duluth prior to the passage of this act, may surrender the same to the judge of the district court for exchange for the bonds of the village of Duluth; and whenever \$218,000 has been surrendered, the judge shall issue to the person so surrendering the bonds of the village of Duluth to one-fourth of the amount so surrendered, and on the delivery of the village bonds shall cancel the amount of city bonds received in exchange.

Other sections provide for annexation of more land from the city limits.

This statute interferes with the rights of creditors. The obligations of a municipal corporation are not affected, although the name may be changed and the territory increased or diminished, if the new organization embraces substantially the same territory and the same inhabitants. It may be true that generally creditors, to obtain relief, must look exclusively to the corporation creating the debt; but when a state of facts exists as disclosed here, and the old corporation is diminished in population, wealth and territory to the extent admitted, it would be a mockery of justice to withhold the relief asked.

Without at this time considering more fully the question presented, whether the several acts of February 25, 1877, and February 28, 1878, impair the obligations of the contract between the city of Duluth and its creditors, it is clear to my

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mind that the bill on its face contains sufficient equity and calls for an answer.

The demurrer is overruled, and the defendant can have until January rule-day to answer.

McCRAEY, *Circuit Judge*, concurred.

NOTE.—Consult 92 U. S. 307; 93 U. S. 266; 100 U. S. 514; *O'Connor v. Memphis*, 13 Cent. Law J. 150; 7 Biss. 146.

On final hearing the following opinion was delivered:

TREAT, *District Judge* (NELSON, *District Judge*, concurring).—On the demurrer in this case two points were decided which are in accord with right, reason and authority: *First*. That under the averments in the bill proceedings in equity furnish an appropriate remedy; and *second*, that if the facts averred are true, the city and village corporations are respectively liable for this indebtedness in the proportion of the taxable property in each.

The bonds and coupons sued on were executed and delivered by the city before the village was carved out of the city territory, and therefore, *at law*, only the corporate party issuing them could be pursued, so long as its corporate existence remained. When an old corporation is dissolved, and a new one created substantially embracing the same territory as the old, the new municipality becomes liable as successor for the debts of the old, although the respective charters differ in many respects, and consequently an action at law will lie. *Broughton v. Pensacola*, 93 U. S. 266.

If the repeal of the old and the grant of the new charter occur pending legal proceedings, the action may be revived by *scire facias* against the new municipality, and in some states by suggestion of record. *O'Connor v. City of Memphis*, 13 C. L. J. 150.

Cities, towns and counties being mere political subdivisions of the state, are at all times subject to legislative control, and may be abolished, divided and subdivided; new municipali-

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ties may be carved out of them, or portions of the territory detached and annexed to another municipality, etc.

It is competent for the legislature, in making such divisions or annexations, to apportion the obligations of the divided territory as to it may seem just. In the absence of such legislative apportionment, the old municipality, if still existing, must bear the entire debt; and when paid by it cannot enforce contribution from the municipality to which parts of its taxable property have been annexed. If a municipality has been abolished and its territory divided among other municipalities, then a creditor may pursue his demand against the latter for their equitable proportions thereof.

These general doctrines have been fully recognized by the United States supreme court and other courts, and also by text writers. *Laramie County v. Albany County*, 92 U. S. 307; *Broughton v. Pensacola*, *supra*; *New Orleans v. Clark*, 95 U. S. 644; *Mt. Pleasant v. Beckwith*, 100 U. S. 514; *State v. Lake City*, 25 Minn. 404; Dillon on Municipal Corp. § 124 *et seq.*; *O'Connor v. City of Memphis*, *supra*.

It is unnecessary to review the many cases cited and commented upon in the foregoing authorities, for nothing can be added to their cogency.

The opinion of this court on the demurrer states with sufficient clearness the general aspect of the case as then presented, including the acts of the legislature whereby the village was created and the debt of the city apportioned. The scheme thus devised to the possible injury of creditors may not appear worthy of special commendation; yet as the legislature in its wisdom and under its authority to control city and village corporations passed the respective acts named they are controlling.

The evidence offered, so far from supporting the allegations of the bill, shows that ample means remain with the city to meet the plaintiff's demand — that the apportionment, at the time made, may not seem entirely equitable, but that, under the increased growth and prosperity of the city, largely due,

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it may be, to the successful operation of said scheme, it is now in a condition to meet its matured obligations, and prospectively all others as they mature. It is well known that many municipalities, with a view to their future interests and growth, incur obligations not to mature for years, in the expectation that at their maturity the taxable property will have so increased that the burthen of payment will be comparatively light. Hence, it is not proper to base conclusions concerning such obligations entirely on the condition of affairs when such obligations were assumed for the purposes mentioned. What is the present condition of the city? Can it meet the coupons accruing? According to the testimony, the taxable property therein has already increased nearly or quite four fold, and is advancing rapidly. There is, therefore, no legal or equitable reason, in the light of authority, for going behind the legislative apportionment. The broad language of most authorities indicates that under no circumstances can a court go behind the legislative apportionment so as to charge such new municipality with more of the old indebtedness than the legislature assigned to it. But certainly such broad doctrines are subject to the qualification stated in the former opinion of this court, viz.: "When the corporation which created the debt is shorn of its population and taxable property to such an extent that there is no reasonable expectation of its meeting the present indebtedness, and it is unable so to do, the creditors, at least, can enforce a proportionate share of their obligations against the two corporations carved out of one. Both are liable to the extent of the property set off to each respectively." The doctrine thus announced must commend itself to every just and right thinking person. While the general rule obtains, that the old corporation remains liable for the old debts, yet when it is shorn by legislative enactment of the means to meet the same, the corporation to which the excised territory has been annexed cannot receive the entire

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benefit thereof to the practical repudiation of subsisting obligations. Were this permissible, no court should hesitate to pronounce the legislative act whereby the obligation of outstanding contracts is impaired — nay practically destroyed — unconstitutional and void. Under the averments of the bill such a case was presented; under the testimony such a condition of affairs does not exist. The case as now before the court is very different from that presented on demurrer.

In *O'Connor v. City of Memphis, supra*, the learned judge, after stating the broad rule above referred to, adds significantly; “A qualification of the latter part of the rule may be assumed, although the point seems never to have arisen in judgment, where the municipality has been so reduced in population and territory as to be unable to meet its liabilities.” It was that qualification which this court recognized in its opinion on the demurrer, and which it still holds to be sound and just. It would be enforced unhesitatingly in this cause did the facts justify. As it is, however, no such qualification is required, for the city has ample means to meet the plaintiff’s demand now in suit, and his remedy is at law.

The bill is dismissed with costs.

BARNES and others v. HARTFORD FIRE INS. CO.

(*District of Minnesota. January, 1882.*)

1. INSURANCE — SEPARATE RISKS UPON SAME PROPERTY — LAWS — MEASURE OF LIABILITY. — Where several insurance companies take separate risks upon the same property, and a loss occurs, the companies are liable in the ratio that their risks bear respectively to the total risk.

Action at law, tried before the court without a jury upon an agreed statement of facts.

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W. D. Cornish, for plaintiffs.

C. K. Davis, for defendant.

NELSON, *District Judge*.—This suit is brought against the defendant upon an insurance policy, dated February 22, 1881, by the terms of which it insured the plaintiffs, as their interest might appear, against loss or damage by fire, “to the amount of \$20,000 upon grain held by them in storage, or in trust, or on commission, or sold but not delivered, contained in elevators and warehouses situate on the lines of the Northern Pacific and St. Paul, Minneapolis & Manitoba Railroads, as per schedule herewith, as the same may be owned, controlled or leased by the said assured.”

The schedule referred to, and which was attached and made a part of the policy of insurance, was in words and figures as follows:

“On grain owned or held by them in storage, or in trust, or on commission, or sold but not delivered, contained in elevators, warehouses, situate on the lines of the Northern Pacific and St. Paul, Minneapolis & Manitoba Railroads, as per schedule herewith, as the same may be owned, controlled, or leased by the said assured.

“It is understood and agreed that, in case of loss under this policy, this company shall be liable only for such proportion of the whole loss as the amount of this insurance bears to the cash value of the whole property herein described and contained in the elevators and warehouses, in schedule herewith, at the time of the fire.

“Permission to clean grain, and to make ordinary alterations and repairs in and to any of the buildings named in this schedule, and to run at night when necessary Other insurance permitted, without notice, until required.

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"SCHEDULE OF ELEVATORS AND WAREHOUSES.

STATIONS.	KIND OF BUILDING.	Capacity in bushels.	Exposures. Detached feet.
Jamestown.....	Frame steam-power elevator.....	50,000	60
Spiritwood.....	Frame warehouse.....	15,000	100
Sanborn.....	Frame warehouse.....	10,000	100
Valley City.....	Frame warehouse.....	10,000	100
Valley City.....	Frame steam-power elevator.....	60,000	300
Tower City.....	Frame warehouse.....	12,000	100
New Buffalo.....	Frame warehouse.....	5,000	100
Wheatland.....	Frame steam-power elevator.....	50,000	100
Casselton.....	Frame steam-power elevator.....	50,000	60
Casselton.....	Frame warehouse (adjoining).....	20,000	80
Mapleton.....	Frame steam-power elevator.....	50,000	100
Mapleton.....	Frame warehouse (adjoining).....	10,000	50
Fargo.....	Frame warehouse.....	15,000	100
Fargo.....	Frame steam-power elevator.....	120,000	100
Glyndon.....	Frame steam-power elevator.....	60,000	100
Hawley.....	Frame warehouse.....	25,000	100
Lake Park.....	Frame warehouse.....	25,000	100
Audubon.....	Frame warehouse.....	15,000	100
Detroit.....	Frame warehouse, large.....	15,000	100
Detroit.....	Frame warehouse, small.....	5,000	100
Perham.....	Frame warehouse.....	15,000	100
Perham.....	Frame H. P. elevator "Wallace"....	20,000	100
Bluffton.....	Frame warehouse.....	5,000	100
Wadena.....	Frame warehouse, large.....	25,000	100
Wadena.....	Frame warehouse, small.....	5,000	100
Verndale.....	Frame warehouse.....	10,000	100
Aldrich.....	Frame warehouse.....	10,000	100
Motley.....	Frame warehouse.....	15,000	100
Belle Prairie....	Frame warehouse.....	10,000	100
Little Falls.....	Frame warehouse, "J. C. Flynn & Co."..	20,000	100
Royalton.....	Frame warehouse.....	10,000	100
Sauk Rapids....	Frame warehouse.....	10,000	100
Blanchard.....	Frame warehouse.....	12,000	100

"It is stipulated that this insurance is limited in each building to amounts named in this schedule, under head of "Capacity in bushels," and this company, in the event of a loss, shall not be liable to contribute over one-tenth of the amount of all the insurance upon property described above.

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“Loss, if any, payable to David Dows & Co., as interest may appear.

“This slip being attached to and becomes a part of Policy No. —, of — —, Agent.”

To meet the demand of the grain business conducted by dealers owning and controlling numerous elevators, at which they purchase and from which they ship and distribute large quantities of grain, continually changing and shifting in the location and in the amount of property to be protected, the insurance companies have adopted this form of policy, by which each company, while insuring a gross sum upon all grain in the elevators in its schedule, yet limits its liability in each elevator as certainly as though the amount allotted each were set opposite its name in the schedule.

It appears that on March 13, 1881, while the policy was in full force, the elevator at Mapleton was destroyed by fire, and the net loss on grain belonging to plaintiffs was \$12,986.18.

At the time this policy was procured the same agent insured the plaintiffs in other companies upon the property described in defendant's policy, and concurrent therewith, to the amount of \$20,000, which additional insurance was in force at the time of the loss; and at that time the plaintiffs also had insurance against loss or damage by fire to the amount of \$330,000 upon grain contained in two elevators at Duluth, and the elevators and warehouses described in defendant's policy.

All the policies were written by filling out and inserting, in the company's ordinary policy, a printed blank slip or schedule, as above set forth, with the addition:

“Duluth steam-power elevator A; capacity, 100,000 bushels; detached.”

“Duluth steam-power Lake Superior elevator; capacity, 100,000 bushels; detached.”

The defendant's policy and two others for \$20,000, making, with defendant's risk, \$40,000, excepted, as appears in schedules, the elevators at Duluth.

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Policies in other companies to the amount of \$330,000 covered the elevators in Duluth as well as those outside.

There was contained in the elevator at Duluth, at the time of the fire, plaintiffs' grain of the cash value of \$168,107.28, and in the elevators and warehouses mentioned in defendant's policy of the cash value of \$189,220.22.

The amount of defendant's liability is the only question at issue in the view taken by the court. To arrive at this it is necessary to ascertain what proportion of the \$330,000 insurance on the grain, both in and outside Duluth, was applicable to pay the loss at the date it occurred. The aggregate value of the grain at the time of the fire was \$357,327.50; of that outside of Duluth, \$189,220.20; so that there would be 189,220.22—356,327.50 part of the \$330,000 insurance which could be applied at the time to loss outside of Duluth—that is, \$174,749. If to this is added the \$40,000 taken by the defendant and other companies upon grain outside of Duluth, it will give \$214,749—the total amount of insurance which must pay the loss. The proportion which defendant and the other companies having \$20,000 like insurance must bear is 40,000-214,749 of \$12,986.18, equal to \$2,418.88, and the defendant company one-half of this sum, which is \$1,209.44.

Judgment will be entered for this amount, with interest and costs.

SECOR and others v. SINGLETON and others.

(Eastern District of Missouri. December, 1881.)

1. **DEMURRER TO BILL—VERIFICATION—EQUITY RULE 81.**—A demurrer to a bill in equity should be certified by counsel to be, in their opinion, well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay.
2. **TAXATION—DECISIONS OF STATE COURTS GOVERN.**—The decision of the highest court of a state upon a question of local taxation is conclusive.

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3. SAME — EXEMPTIONS.— Where the stock of a company is by law exempt from taxation, its property cannot be taxed. *Scotland County v. Missouri, Iowa & Nebraska R. Co.* 65 Mo. 120.

In equity. Demurrer.

The bill alleged that the Alexandria & Bloomfield Railroad Company was duly incorporated by an act of the general assembly of the state of Missouri, and that by a provision of its charter its stock was made exempt from taxation for the period of twenty years after its completion, which period has not yet expired; that said road ran through the counties of Clark, Scotland and Schuyler, in the state of Missouri, to a point on the northern boundary line of said state; that said company was afterwards consolidated, under the laws of Missouri and Iowa, with the Iowa Southern Railway Company, a corporation in the state of Iowa, and has been since known as the Missouri, Iowa & Nebraska Railway Company; that by virtue of the laws of said states the consolidated company became entitled to all the privileges and immunities of the original corporations; that said Iowa & Nebraska Railway Company has no property in said counties of Clark, Scotland and Schuyler, except its road-bed and other property used in the operation of its road; that taxes had been illegally assessed against said property, and that the defendants, the auditor of the state of Missouri, the judges of the county courts of said counties, and others, have combined to compel said company to pay taxes in said counties upon its property therein situated, and had employed attorneys to institute and maintain suits for taxes assessed against said property; that the complainants owned a large amount of stock in said company, and had requested the directors and officers of said company, and said company, to refuse to pay said taxes, and to take proper steps to resist the imposition of taxes upon said property, but that they had refused to take any such steps; and that said company had, through its officers, announced its intention to pay said illegal taxes. The prayer of the bill was that the

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taxation of said company's property should be declared illegal, and the acts of the auditor and the county officers void and of no effect; and for a writ of injunction to restrain the defendants from taking any steps towards the assessment of taxes upon the property of said road, or the collection thereof. The defendants demurred to the bill upon the ground that it set forth no ground of action or complaint against them. The demurrer was not certified by counsel to be, in their opinions, well founded in point of law, nor was it supported by the affidavit of the defendants that it was not interposed for delay.

Baker & Hughes, for plaintiffs.

Waldo P. Johnson and *H. A. Cunningham*, for defendants.

TREAT, *District Judge*.—A so-called demurrer was filed to the amended bill in this case on April 1, 1880, not in conformity with rule 31, United States supreme court. The plaintiff might have moved, therefore, more than a year ago, for a decree *pro confesso* as to said demurrants. That so-called demurrer is now submitted and overruled. An examination of the case satisfies the court that if said demurrer had conformed to the rules, it would not have been well taken. It was interposed, obviously, for mere delay, inasmuch as the only legal question involved had been decided, as set out in the bill (65 Mo. 123), adversely; which decision this court recognizes as conclusive on a question of state taxation.

To the amended bill, filed January 7, 1880, only one answer has been filed, which is a general denial, couched in the form of an answer to a law action in the state court, and not sworn to. No replication thereto has been filed; so the case has been suffered to float. More than a year ago the plaintiff could have had, by proper motion, a decree *pro confesso*: (1) Because the so-called demurrer was no demurrer in conformity with the rules of the supreme court; and, even if it

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were, it was not well taken, under the conclusive rulings of the supreme court of Missouri. (2) Several of the defendants had interposed no answer to the amended bills. (3) The only defendant purporting to answer interposed merely a general denial to the allegations of the bill, to which there should, possibly, have been a *pro forma* replication. Such practice as a general denial in form of a general issue is wholly unknown in equity; and, whether allowable or not, the case might have been set down for hearing on the pleadings, with such evidence as had been presented within the time prescribed for taking the same. If such a denial as to Holliday puts the party to a formal replication and proofs, the said defendant could, on motion, have the case dismissed as to him. But the manner in which these faulty proceedings have been pursued induces the court to permit, on terms, further action to be had, so far as the same may pertain to the merits, and no further.

The demurrer will be overruled, at the cost of the demurrants. Plaintiffs may take such further action as they may deem necessary.

PRESIDENT AND DIRECTORS OF THE INSURANCE COMPANY OF
NORTH AMERICA *v.* ST. LOUIS, IRON MOUNTAIN & SOUTHERN
R'Y Co.

SAME *v.* SAME.

SAME *v.* SAME.

(*Eastern District of Missouri. January, 1882.*)

1. COMMON CARRIER — BILL OF LADING — NEGLIGENCE. — A provision in a bill of lading, issued by a common carrier, to the effect that the carrier shall not be liable for loss by fire, will not exempt it from liability for a loss by fire occurring through its negligence.
2. SAME — NEGLIGENCE. — Where a common carrier undertakes to transport cotton for hire upon open flat cars, it is bound to take all needful precautions for the cotton's safety and protection.
3. SAME — SAME — MEASURE OF DAMAGES. — Where cotton in course of transportation by a common carrier was destroyed by fire in conse-

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quence of the carrier's gross negligence, and the owners assigned and transferred their interest in said cotton and their rights against said carrier to a fire insurance company, by which the cotton was insured, upon its indemnifying them for the loss sustained, *held*, that the insurance company was entitled, as against the carrier, to the value of the cotton at the time of the loss, with six per cent. interest from the day upon which the cotton would probably have been delivered to the owners if it had not been destroyed.

The facts alleged in the petitions in the above entitled cases are, so far as it is thought necessary to set them out here, substantially as follows:

Certain bales of cotton, owned by different parties in each case, were lost while in the custody of the defendant, a common carrier, and while being transported by it for hire.

At the time of the loss the cotton was covered by certain policies of insurance issued by the plaintiff, and upon its paying certain sums to the owners of the cotton they assigned all their rights, titles and interests in, to and concerning it to said company. The owners of the cotton are alleged in said petitions to have been damaged in certain specified sums, and the insurance company asked judgment for the amount of damages sustained by them.

The answers deny the facts alleged in the petitions, and allege that the losses complained of occurred from fire, without negligence on the part of the defendant, and that it was expressly stipulated and agreed by the shippers of the cotton that the defendant should not be liable as a common carrier or otherwise for loss or damages caused by fire.

In the replies the affirmative allegations in the answers are denied, and gross negligence on the defendant's part is alleged.

A jury was waived and the three cases were tried together by the court sitting as a jury.

At the trial, it appeared from the evidence that the losses all occurred from fire, through the defendant's negligence in attempting to convey the cotton on open flat cars through woods which were on fire.

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In the case referred to as the one in which the negligence was least culpable, the conductor did not see the fire until very close to it, and, there being no side track, went ahead. In the other case the smoke arising from the fire could be seen at a distance, and the cars on which the cotton was loaded might have been left in safety upon a side track. The cotton would probably have been delivered to its owners, if it had not been destroyed, on or about January 10, 1877.

The amounts referred to in the opinion of the court are the sums which the different shipments of cotton were proved to have been worth at the time of the loss.

The allegations of the answers in reference to the provisions in the bills of lading as to the liability of the carrier by fire were proved.

Robert Harbison, for plaintiff.

Porter & Pike, for defendant.

TREAT, *District Judge*.—These cases were heard at the same time and rest mainly on the same general principles. Some of the evidence introduced was incompetent, it being merely hearsay, as contradistinguished from "verbal facts." Discarding all such, the main question decisive of the cases is as to the defendant's negligence. Although the shipment of cotton on open or flat cars may not be in itself such an act of negligence as would make the carrier liable under all contingencies, yet, when such shipment is made, there is devolved upon the carrier the duty to take the additional precautions needed for the protection and safety of the cotton. In these cases it seems that not only was no such precaution taken, but that the train in two of the cases was hurried forward when fires were adjacent to the track or sufficiently near to render it more than probable that so inflammable an article would be ignited and destroyed. In the other case the negligence, although not so gross, was extremely culpable.

As it is admitted that if the loss was caused by the de-

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fendant's negligence the plaintiff must recover, it is unnecessary to consider what effect, if any, the Texas statutes would have upon the exemptions in the bill of lading against loss by fire, so far as the defendant is concerned. R. S. Texas, 1879, p. 48.

Judgments for the plaintiff will be enforced for the respective amounts, with interest at the rate of six per cent. per year from January 10, 1877, with costs.

MARSH v. UNION PACIFIC RAILWAY Co.

(District of Colorado. January, 1882.)

1. **COMMON CARRIER — LIEN OF, DEPENDS ON CONTRACT.**—The lien of a common carrier on goods transported depends on the contract with the owner. Ordinarily the law implies such lien, and it will be held that, in delivering goods to be carried, the owner assents to the condition that the carrier may retain possession of the goods until his reasonable charges have been paid, although nothing may be said on the subject. But when goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money. Nor in case of prepayment of the freight upon contract for through rate.
2. **SAME — THROUGH RATE — RECEIVING GOODS WITH KNOWLEDGE OF CONTRACT FOR.**—A common carrier receiving goods from another carrier, with knowledge that a through contract has been made, and the price of transportation to the point of destination paid in advance, can assert no lien on such goods for transporting them over its line.
3. **TROVER** lies for the value of goods illegally withheld under claim of lien for freight money.
4. **EVIDENCE — HOW VALUE OF HOUSEHOLD GOODS TO BE PROVEN.**—In such an action the plaintiff is a competent witness to testify as to the value of the goods, though he may not know the market value of such goods at the place of delivery. Perhaps the best way to arrive at the value of such goods would be to show the price in the market of new goods of the same character, and then show, as nearly as possible, the extent of depreciation from use. But such course is not open to a plaintiff when the defendant retains possession of the goods. In the matter of values, as in other matters, the law will give relief according to the injury, on the best testimony that can be obtained.

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5. **AMOUNT OF DAMAGES.**— When there is reason to believe the amount returned by the jury is larger than the reasonable value of the property, plaintiff may be required to elect between an abatement of part thereof or submit to a new trial. Electing to abate, a new trial will not be ordered.

In April last, at Zanesville, Ohio, plaintiff made a contract with the Pittsburg, Cincinnati & St. Louis Railway Company to convey for him a car-load of household goods from Zanesville to Denver, for the sum of \$185, then paid to said company. The car was brought to St. Louis by that company, and from St. Louis to Kansas City by the Wabash, St. Louis & Pacific Railway Company, and from Kansas City to Denver by defendant. At Denver defendant demanded an additional sum of \$15 freight money, claiming that its charge for conveying a car-load of such goods from Kansas City to Denver was \$100, and, as it had received only \$85 from the Wabash Company, the sum of \$15 was still due from plaintiff. Some discussion ensued between defendant's agent and plaintiff, in the course of which the agent was told by plaintiff that a through rate to Denver was paid on the car, and defendant refusing to deliver the goods until the \$15 should be paid, and plaintiff refusing to pay, this action of trover was brought to recover their value.

At the trial there was evidence to the effect that the Pittsburg Company had authority from defendant to make through contracts for carrying freight to points on the line of defendant's road, at the rates given in the schedules published by defendant. In this instance, however, the rate was fixed on a joint schedule, published by the Wabash Company and the Missouri Pacific Company, each of which has a road extending from St. Louis to Kansas City. This schedule gave through rates to Denver and other points in the west, the authors of it apparently assuming to add to their own the rates of other roads connecting with their roads at Kansas City.

Some discussion has arisen at the bar upon the amount due

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the Wabash Company under the schedule for carrying the car from St. Louis to Kansas City, and whether the schedule was properly understood by the Pittsburg Company, but it is not necessary to state it, as the point was not put before the jury. The bill of lading or manifest under which the Wabash Company brought the car from St. Louis to Kansas City was not put in evidence. From all that could be gathered at the trial, it would appear that it was not the practice to send a bill of lading with the car from the place of shipment to destination. But something called a transfer sheet was delivered with the car by each company to its successor in the line of travel. And there was evidence tending to prove that the transfer sheet contained no other information of a through contract for carrying the car than the place of shipment and the amount of money turned over with the car. The manifest, sent with the car from Kansas City to Denver by defendant's agent, contained these words, in brackets, "Will remit \$85 — to apply," and the fact that \$85 was paid to defendant by the Wabash Company on account of the transportation of the car was not denied; several witnesses testified that it was a rule with defendant to demand payment in advance for carrying household goods, and this was not controverted.

The goods in the car were furniture, beds and bedding, carpets, crockery, pictures, books and other articles usually kept for family use. Plaintiff had used them in his house at Zanesville for several years, and was removing them to Denver, with a view to establish his residence at that place, and to make use of the goods in his house. At the trial he offered himself as a witness to prove the quality and value of the goods. As to his knowledge of values in Denver, he testified that he had occasionally inquired at a second-hand store for the price of furniture and other articles there exposed for sale; that he attended a sale by auction of second-hand goods made by an assignee; that he had bought some articles of furniture for household use, but he had no general knowl-

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edge of the value in Denver of new or second-hand goods of the kind and quality shipped in the car.

Defendant objected that he was not competent to testify as to the value, but the court overruled the objection and received the testimony.

In the course of plaintiff's examination it became apparent that his ideas of values were derived mainly from the original cost of the articles at Zanesville. In some instances he claimed to have knowledge of the value of new goods of the same kind in Denver, but in great part he relied apparently on the original cost, deducting something, not very much, for wear and tear. He frequently spoke of "the value to him" and "the value to him to wear out," thus distinguishing between the value in market as second-hand goods and to the owner for use. Defendant's counsel contended that this was a sentimental value — *pretium affectionis* — arising from long possession and use of the articles. There was nothing, however, to indicate that the words were used in that sense, except that there were several portraits of members of his family in the lot. And as to them, the plaintiff did not express an extraordinary value, but was apparently relying on the cost of them. In the aggregate, he fixed the value of the goods at something over \$2,700. No other witness was called by plaintiff to prove the value, and no testimony was offered by either party as to the value in Denver of new goods of the same kind and quality. Defendant did not assert or claim that plaintiff had gone beyond the cost of new goods of the same kind in his estimate of value.

Two dealers in second-hand goods, of large experience in Denver, were offered by defendant. They had examined the goods, not very carefully, but so as to make an estimate of their value. They thought the goods were worth to the owner, for use, \$725; for sale as second-hand goods, about \$400.

The charge to the jury was as follows:

"The plaintiff brings this action, gentlemen, to recover the

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value of goods which have been described in the evidence, upon the ground that they were wrongfully detained by the railroad company, the defendant. The defense is, that the company had a lien upon the goods for unpaid freight charges, and a right to detain the goods until the charges should be paid. If there was any such lien, the company, of course, could hold on to the goods until their charges were satisfied. And that is the principal question to be decided; whether there was or was not any such lien upon the goods.

“It is in evidence before you that the goods were shipped, from Zanesville, in the state of Ohio, on the Pittsburg, Cincinnati & St. Louis Railway, to this place, and that the plaintiff, at the time of shipment, paid what was demanded as a through rate for the goods to this point—that is, the full amount as given by the Pittsburg, Cincinnati & St. Louis Railway Company as the charges for transporting the goods to this place. If the Pittsburg Company had authority from the defendant here to make contracts in its behalf, that contract, of course, would be as binding upon this defendant, the Union Pacific Railway Company, as it was upon the Pittsburg Company. But I do not think that there is any evidence before you to show that it had such authority. The evidence is contained in these depositions, that it is the practice of railroad companies to make contracts for carrying goods to distant points upon the published rates, the tariff of charges as published by the different companies in the line of transportation—that is, they would take the charges on their own line, and the charges of the Wabash, if that is the other company that would carry from the terminus of the Pittsburg Company's line to Kansas City, and the tariff of the Union Pacific Company, and make up the amount from these several tariffs.

“Now, the evidence is, that, in this instance, they took the tariff of charges as published by the Missouri Pacific and the Wabash roads, that have lines extending from St. Louis to Kansas City, and it seems that they had put out a sched-

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ule in which they had fixed the rate to points in this city and elsewhere in the west. But it is plain enough that the Wabash Company and the Pacific Company could not fix rates for the Union Pacific Company, and as this rate was fixed upon the schedule published by these two companies, the Wabash and the Missouri Pacific, it does not follow from that at all that the rate, as published by the Union Pacific for this part of the line of transportation, was used in making up the aggregate price for bringing the goods to this place. It may be the rate, but there is no evidence to show that it is the rate.

“Now, upon that, we are able to say that it does not affirmatively appear that the Pittsburg Company had authority from this defendant to make contracts of this character; and so we must ascertain whether there is any other ground on which the defendant may be liable, and upon that I am of the opinion, that if the Pittsburg Company did, in fact, fix a through rate, and receive pay for that, and this defendant, or its agents and officers, at the time of receiving the goods, had information of that fact, that a through rate had been paid, that may be sufficient. It is not necessary that the amount paid should have been that charged by the Union Pacific Company, nor is it necessary that the Union Pacific Company, or its officers or agents, at the time of receiving the car, should have known what was paid. But the circumstance that a through rate had been paid — in other words, that a contract was made with the Pittsburg Company for transporting the goods from Zanesville, Ohio, to Denver, and that they had been paid for it; for if that is true, if, knowing that, they received the goods and transported them, they knew, at the time of receiving them, and at the time of transporting them, that the plaintiff was acting upon the theory, upon the hypothesis, that the goods were paid through in sending them from Zanesville. They knew, of course, if that is true, that, in delivering the goods in the first instance to the Pittsburg

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Company for transportation, he had assumed that the charges were paid, and, upon that, I do not think that any contract can be implied which would give to this defendant a right to assert a lien against the goods for any amount that may be due them, even if the amount received by the Pittsburg Company was not sufficient to pay their rate. Because, when a party delivers goods to a railroad company, and makes a contract for transporting them to destination, to the place where he wishes to send them, and, at the same time, pays the amount demanded, it cannot be said that he has agreed that anything additional shall be charged to him, and that any of the carriers in the line of transportation shall have a lien upon the goods for such charges. By paying in advance the sum which is demanded, he completes, he fulfills, the contract on his part; it is all that is required of him; and it cannot be said afterwards that he has assented to the right of any company to charge his goods with a lien in respect to the carriage of them, and that, although a mistake may have been made in respect to the amount to be charged. So that the important question, as it seems to me, for your consideration, is whether, at the time of receiving these goods, and forwarding them to this place, the agents and officers of this defendant knew that a contract had been made for transporting the goods through to this point, and payment had been made in accordance with that contract. Now, upon that, the evidence is, that, at the time these goods were turned over, that some money, \$85, it is said that that was not sufficient, but \$85 was turned over by the Missouri Pacific, or whatever company it was that brought the goods from St. Louis to Kansas City, to this company; and it is also said in some of these depositions, it was the usage and custom of the company to require prepayment upon this class of goods. That also is in testimony. If, upon this testimony, you believe that the agents and officers of the defendant company knew, at the time these goods were received, that a contract for carrying them to this place had

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been made, and that payment had been made for carrying them through to this place, that is enough. If you find they had no such knowledge, then your finding will be for the defendant.

“With that explanation, there is only one other thing, and that is the value of these goods. The counsel have asked me to say that the value of the property in controversy is what the goods are shown, by the testimony, to be worth in this market, and not what the plaintiff testifies they would be worth to him to wear out. That is a correct proposition, so far as it states that it is the value of the goods in this market, for this is the place of the conversion, if there was any conversion. But it is the value of the goods to the plaintiff, and for use to him, perhaps not what he considered them to be worth to him, not his estimate of their value, but what they were worth to him, and for the purpose of their intended use to him; and it is not the value of the goods in a second-hand store, because, as we all know, goods of this class are of very little value in such places as that; not what they would sell for out of one of these establishments on the street, but what the goods were reasonably worth to the plaintiff, for the purpose for which he intended to use them, to him as the owner of them, as the person who intended to make use of them in his household affairs.

“I would like you to distinguish, if possible, between the estimate he may place, any sentimental value he may attach to them as things he may have owned for a long time, and all that, and the value which may be given upon the street or amongst dealers. I do not think it is either one or the other; it is not the peculiar value the owner may attach to them on account of the service they have rendered to him, nor is it the value for which they would sell in the market as things that are somewhat worn, and which are not very salable under the most favorable circumstances. It is something between these different values. It is the value which the owner may find in them, using them in the ordinary

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course of his affairs, and which everyone has, in so far as one is a housekeeper, in the goods, furniture in his house; the value to him for that use. If you can come to some conclusion upon that, that is the measure of damages.

"I do not know, gentlemen, that there is anything more to be said to you."

Defendant's counsel asks the court to instruct the jury that the burden of proof to show that this contract had been made is upon the plaintiff, and no failure upon our part to produce any evidence can be taken in his favor; he must make out that a special contract had been made.

The Court: "That is true, gentlemen; the burden is upon the plaintiff to establish everything essential to recovery. There is no question upon any point as to the making of the contract — that is clearly enough shown, the making of the contract and the shipment of the goods. Upon this question, as to whether the defendant company knew, at the time of receiving the goods, that a through contract had been made to Denver, and payment made in accordance with the terms of that contract, the fact must appear to you by a preponderance of testimony; the weight of the testimony must be on that side to enable the plaintiff to recover."

The jury returned a verdict for plaintiff, assessing damages at \$2,000.

Defendant moved for new trial, alleging error in receiving plaintiff's testimony as to the value of the goods, in the charge to the jury, and that the damages are excessive.

J. W. Horner, for plaintiff.

Willard Teller, for defendant.

HALLETT, *District Judge*.—The lien of a carrier for freight money on the goods transported by him depends on the contract with the owner. Not that it is necessary that the lien should be mentioned in the contract, but there must be a contract for carriage on which it may rest. In the ordinary

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course of business, goods delivered for carriage are subject to the condition implied by law that the carrier may retain possession of them until his reasonable charges shall be paid. In delivering them to be carried the owners assent to that condition, although nothing may be said on the subject, and thus it becomes a part of the contract — just as, in the absence of agreement as to price, the law will imply that it shall be reasonable. On this principle it is settled that a wrongdoer cannot confer on the carrier the right to assert a lien against the true owner. And when goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money. *Fitch v. Newbury*, 1 Doug. (Mich.) 1; *Robinson v. Baker*, 5 Cush. 137; *Stevens v. Boston & Worcester R. R.* 8 Gray, 262. Because the owner cannot be divested of his property without his consent, and to allow a lien on the goods in a matter to which he has not assented would divest him of his property to the extent of the lien.

To apply the rule to the present case, it is only necessary to say that, in the contract with the Pittsburg Company, plaintiff did not in any way consent to have his goods charged with a lien for carrying them to Denver. It was not an agreement to pay, and that his goods should be held until he should pay, but he did in fact pay the price of carrying the goods, and as to him the contract was fully executed before the goods left Zanesville. Plaintiff paid the price demanded of him, and all that was demanded for carrying the goods, and it would be absurd to say that he assented to a lien on his goods for the same thing — the money which he had already paid.

But it is said that the Pittsburg Company had no authority from defendant to fix the price of carrying the goods in the way that it was done — on the schedule published by the Wabash and Missouri Pacific Companies. And so the court ruled at the trial, without referring to defendant's rule that for carrying household goods payment must be made in ad-

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vance, under which it might be claimed with reason that the company first receiving the goods was defendant's agent to fix the rate and receive the money. This point was not stated to the jury, however, and they were advised that the Pittsburg Company was without authority from defendant to make the contract. The jury was also instructed to find whether the goods were received by defendant at Kansas City with knowledge that a through contract had been made by the Pittsburg Company, and the price paid for carrying them. Of that there was ample evidence in the rule of defendant requiring prepayment on household goods, and the fact that \$85 was paid to defendant by the Wabash Company on account of freight money. Some of defendant's witnesses say that the payment by the Wabash Company is of no weight, as freight money is often advanced by shippers when a through contract has not been made, and it would be impossible to determine whether the money was paid on a through contract or as an installment of freight money. This means that money is paid in both ways, and leaves the payment by the Wabash Company to stand as affording some evidence of a through contract. Taken in connection with the rule requiring payment in advance on household goods, it was sufficient to warrant the finding that defendant received the goods with knowledge that a through contract had been made for carrying them to destination.

And if defendant was advised of the terms of the contract before it performed the part assigned to it, there would be force in the suggestion that by such performance the contract was accepted. It is not necessary, however, to go so far, for the fact that a through contract and payment was made, and that defendant had knowledge of it, is enough to defeat the lien.

Independently of that circumstance there may be room for debate whether one who has paid the price of carriage can be further charged in respect to the same matter; whether all companies who have a part in the contract and perform

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that part shall not be regarded as accepting the contract; whether any of the companies in the line of transportation after the first shall be taken to be the agent of the shipper to make a new contract for him, when, by acting for himself, he has practically denied the authority of another to act for him. But these are points with which we are not now concerned. The jury have found, upon sufficient evidence, that defendant received the goods with knowledge of the fact that a through contract for carrying them had been made, and that plaintiff had paid for the service, and that, of itself, displaces the lien on which defendant relies.

This is enough to show that the action may be maintained; for trover lies for the value of goods illegally withheld under a claim of lien for freight money. *Adams v. Clark*, 9 Cush. 215.

Objection is made to the plaintiff as a witness to prove the value of the goods, on the ground that he had no knowledge of the market for such goods in Denver. Many cases are cited to the point that the market price in the place of conversion must control; a proposition which cannot be controverted. Whenever it appears that there is anything like an established price in the market, for which the articles in controversy can be replaced, that price will measure the damages for converting such articles. But for household goods, more or less worn, there is no established price, unless it be that at which second-hand goods of the same kind is sold. And although people who discontinue housekeeping may be compelled to accept that price, no one will contend that it is the full value of the goods. The fact that goods in use, if sold at all, must be sold at a sacrifice, is too plain for argument, and therefore the price of such goods in market will not be adequate compensation to one who is deprived of his goods by a wrongdoer. Perhaps the best way to arrive at the value of such goods would be to show the price in market of new goods of the same kind, and then show, as nearly as possible, the extent of depreciation from use. But this

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course was not open to plaintiff, for the goods were in defendant's possession, probably not in a condition to be examined, and plaintiff was not bound to inquire whether he would be allowed to send witnesses to inspect them. If it is suggested that a dealer, hearing a description of the articles, would be able to fix their value, the answer may be that few persons would be able to give a description which can be understood. The average man would find himself very much embarrassed in any effort to describe furniture and other articles of household use definitely, so as to enable one who never saw them to judge of their value. No one in Colorado knew anything of these goods, and among plaintiff's acquaintances in Zanesville he could not expect to find any one more competent than himself to testify as to their value. On the whole, it would seem that if plaintiff's testimony as to value cannot be accepted, he will be defeated of his right, and that will not be allowed. In the matter of values, as in other matters, the law will give relief, according to the injury, on the best testimony that can be obtained. *Stickney v. Allen*, 10 Gray, 352; *Starkey v. Kelley*, 50 N. Y. 676.

On the other hand, defendant being in possession of the goods was in a position to prove their value in a manner which would dispel all doubts. It attempted to do this, but the evidence is not very satisfactory. The goods were not in a condition to be examined with care, and defendant's witnesses did not give the attention necessary to correctly estimate their value. Evidence of the value in this market of new goods of the same kind, which would have enlightened the jury, was not offered by either party, and if the verdict is wrong the fault is not wholly with the jury. There is, however, some reason to believe that the amount returned is large, and the plaintiff will be required to remit \$500, or submit to a new trial.

The evidence of value offered by defendant was probably entitled to greater weight than was allowed to it, although

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it cannot be said that it should control. If the plaintiff will remit from the damages the sum of \$500, the verdict may stand, otherwise a new trial will be allowed.

Plaintiff remitted the \$500, and judgment was entered for \$1,500.

HUDSON v. KANSAS PACIFIC R'y Co.

(*District of Colorado. January, 1882.*)

1. RAILROADS — COUPON TICKETS — RIGHTS OF HOLDERS.— Where a railroad company issues a ticket entitling the holder to a passage over its own and connecting lines to the place of destination mentioned in the ticket, and there is no limitation in it upon the right of the holder to transfer it to another, *held*, that upon the refusal of a connecting line to accept the ticket, and of the contracting company to furnish a local ticket over that line or the amount of money necessary to procure one, the holder has a right of action against the original contracting company for breach of contract; and this right is assignable, under the laws of the state of Colorado, so as to give a right of action to the assignee.
2. VERDICT — DEFECTS IN PLEADING CURED BY.— It is too late after verdict to object that the assignee alleged that he purchased such ticket, when the proof shows that it was bought by others, or that he failed to allege a failure on the part of the contracting company to redeem the ticket.

On motion for a new trial.

HALLETT, *District Judge*.— Plaintiff alleged that he purchased at St. Louis and at Kansas City, Missouri, in the year 1879, of defendant's agents, certain passenger tickets over the lines of the Denver & Rio Grande Railway, in this state, paying therefor the prices named in the complaint, and that the tickets were, and are, worthless, as the Rio Grande Company refuse to recognize them. At the trial it appeared that the tickets were issued by eastern companies having lines extending to Kansas City, not to the plaintiff, as alleged, but to travelers in the regular course of business. When

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issued, they provided for passage over the line of the company by which they were issued to Kansas City, and from that place to Denver, over defendant's line, and from Denver to destination, over the lines of the Rio Grande Company. Coupons were attached applicable to the several parts of the route, and as the Rio Grande Company was to complete the contract, its coupon was the last of the series, and connected with the general provisions constituting the contract. All of them were in substance like those issued by the Missouri Pacific Railway Company, in the following form:

<p>MISSOURI PACIFIC RAILWAY.</p> <p>This Ticket entitles the holder to one First-Class Passage</p> <p>TO TRINIDAD, COLORADO.</p> <p>This Ticket is void unless officially stamped and dated. In selling this Ticket for Passage over other roads this company acts only as Agent, and assumes no responsibility beyond its own line. This Company assumes no risk on baggage, except for wearing apparel, and limits its responsibility to \$100 in value. All baggage exceeding that value will be at the risk of the owner unless taken by special contract. The checks belonging to this Ticket will be void if detached.</p> <p>F. E. FOWLER, FORM 307. <i>Acting Gen'l Passenger Agent.</i></p>	<p>FORM 307.</p> <p>Issued by MISSOURI PACIFIC RAILWAY COMPANY. Denver & Rio Grande R'y. One First-Class Passage. Denver to Trinidad. This Check is not good if detached. M P-K P-D & R G. Trinidad, Col.</p> <p>23</p>
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It will be observed that there are no conditions as to the time of performing the journey, or as to the right of the purchaser to transfer the ticket to another. It entitles the holder "to one first-class passage" from the place of departure, which, in this instance, was St. Louis, Missouri, to Trinidad, Colorado.

At its office in Denver, for a month or more, the defendant redeemed tickets similar to these in all respects, paying therefor local rates from Denver to the points named in the tickets. It was not then contended that the right was limited to the original purchaser, but payment was made to the holder, and many of them were presented by the plaintiff

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himself, who received the money for them. The tickets in suit were bought by plaintiff, who calls himself a "ticket broker," in the expectation that defendant would redeem them as had been done with others of the same class. As to these tickets, defendant's agent at first requested plaintiff to hold them a few days until the money should be received for redeeming them, and, after four days, defendant absolutely refused to redeem them. Meantime plaintiff had bought others of the same class, amounting in all to the sum in controversy, and after defendant refused them he bought no more.

As to what may be a fair deduction from this proceeding, concerning defendant's liability, there is not much room for discussion. That defendant should accept the coupon for travel over its own line implies only that it was sold by its authority. But if that was the limit of authority in the company selling the ticket, why should defendant assume responsibility in respect to the remainder of the journey over the Rio Grande line? As to tickets of this class, defendant not only performed the part assigned to it in the original contract by carrying the passenger from Kansas City to Denver, but also protected the remainder of the ticket by furnishing a local ticket to destination, or paying the money which would procure it. A fair inference from such conduct may be that the ticket was originally sold by its authority. And if sold by defendant's authority, and the Rio Grande Company refused to carry the passenger according to its terms, the defendant was clearly liable to some one for the value of the ticket. It must often happen in the effort to draw travel over its lines which would otherwise go to a rival, that a railroad company will assume the burden of carrying a passenger beyond its own terminus, and in such case there would seem to be nothing in reason or authority to exempt it from liability on its contract.

It is conceded that a railroad company may contract to carry a passenger any distance, provided its own line be a

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part of the journey. And whether the part owned by the contracting company be the first or the last, or from the middle, must be wholly immaterial. The principle is, that, in promoting its own business, a railroad company may make any contract which it may have capacity to perform in some part, although not the whole, and the exact part, whether great or small, cannot be material.

The objection that a contract for transportation over a railroad, is not assignable by a passenger, if correct in principle, does not meet the case. The evidence shows that the Rio Grande Company did not accept the tickets, and it must have been known to defendant when they were sold that they would not be honored. The fact that other tickets bought of the Rio Grande Company were given in lieu of them, or that money was paid for them at the option of the holder, admits of no other construction. The truth appears to be that the tickets were not sold to be used on the Rio Grande road according to their terms, and could not be so used. How, then, shall we say that the purchaser was bound to ride in person, when he was not allowed to ride either in person or by another, or in any way. If he has no remedy in damages, it would seem that he is without remedy.

It may be conceded also that a ticket is a receipt for passage money, and not full evidence of the contract to carry, as declared in *Quimby's Case*, 17 N. Y. 306. But it is, nevertheless, in the hands of the passenger, evidence of his right to be on the train, without which he cannot travel. By delivering it to another, he may signify his purpose to assign his contract with defendant, and that should be enough.

We have seen that although the tickets were for passage over the Rio Grande road they were not available for that purpose, and the right of the holder to demand of defendant a ticket or money, whatever it was, could be maintained. That it was assignable under our statute, so as to give a right of action to the assignee, would seem to be clear, and the delivery of the ticket, although it should be called a receipt

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or token, should be evidence of such assignment. Can it be questioned that in delivering the ticket to plaintiff the holder intended to part with his right? If he did so intend, the right of action is now in the plaintiff, although the contract as originally made may have contained something more than is expressed in the ticket.

It is also said that the facts appearing in evidence are not set out in the complaint, and the proof varies from the allegation. The plaintiff charges that ~~he~~ purchased the tickets of defendant's agents, and the fact appears to be that they were bought by others, of whom plaintiff bought them. He has said nothing in the complaint of the redemption of the tickets by defendant, but relied on the refusal of the Rio Grande Company to honor them. Whatever weight this objection would have, if made at the trial, it is believed that it comes too late after verdict. The matter in issue between the parties was the present value of the tickets, as defendant must have understood from the complaint, and no formal objection can now be entertained.

The motion for new trial will be denied.

J. F. Welborn, for plaintiff.

Willard Teller and *J. P. Usher*, for defendant.

BUFORD & Co. v. STROTHER & CONKLIN.

JOHN DERE & Co. v. STROTHER & E. CONKLIN.

BOYD, Adm'r, etc., v. BRADISH and another.

(*District of Iowa. November, 1881.*)

1. REMOVAL OF CAUSE AFTER JUDGMENT.— Where a supplemental proceeding is a mere mode of execution or relief inseparably connected with the original judgment or decree, it cannot be removed, although some new controversy or issue between plaintiff in the original action and a new party may arise out of the proceeding. But where such proceeding is not a mere mode of execution or relief, but involves

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an independent controversy with a new or different party, it may be removed into the federal court.

2. **SAME — CAUSE, WHEN REMANDED.**— Where the plaintiff in a suit in a state court obtained judgment against the defendant, garnished certain parties, and, after taking issue upon the answer of the garnishees, removed the issues thus made to the circuit court of the United States, *held*, on motion by the original defendant and the garnishees to remand the cause, that the motion be maintained on the ground that the proceedings are a mere mode of execution or relief, inseparably connected with the original judgment.
3. **SAME — MOTION TO REMAND, WHEN DENIED.**— In an action in the state court against a corporation, incorporated under the laws of the state of Iowa, the plaintiff obtained judgment, and, upon a return of the execution unsatisfied, he proceeded against certain stockholders in the corporation under the provisions of chapter 181, title 9, of the state court, and removed these proceedings into the circuit court of the United States. *Held*, on motion to remand, that the motion be denied, on the ground that such proceedings involve an independent controversy with new parties, against whom the plaintiff seeks to establish a new liability.

Motion to remand.

LOVE, *District Judge*.— The foregoing cases are now before us upon motions to remand the same to the state courts from which they were brought into this. The motions to remand are all placed by counsel upon the same general grounds. It is insisted as to each of these cases that it is a proceeding supplemental to the original cause out of which it grew, and being a mere *appendage* to the judgment rendered in the original case, it cannot be separated from the same and brought for adjudication here. These several motions may therefore be considered together.

There is no question of jurisdiction in any of these cases, as far as citizenship and the amount involved are concerned.

The first two causes are proceedings by garnishment. The plaintiffs in these cases obtained judgments against the defendants in the state court, caused certain parties to be garnished, and having taken issue upon the answers of the garnishees, the plaintiff removed the issues thus made for de-

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termination into this court. The original defendant and the garnishees now move to remand.

In the third case the plaintiff, a citizen of Wisconsin, obtained a judgment in the state court against an Iowa corporation, and having failed to obtain satisfaction of the judgment, he seeks by this action to make the present defendants, who are stockholders in the corporation, liable, in pursuance of chapter 181, title 9, of the code of Iowa. The plaintiff in the present action against the defendants, one of whom is a director and the other a stockholder in the corporation, sets out his judgment and the return of execution *nulla bona*; charges the defendants with certain alleged frauds to his injury within the provisions of the statute; and prays judgment for his damages. The plaintiff caused the proceedings against the stockholders to be removed into this court. The defendants move to remand to the state court.

What is the true principle applicable to this class of removal cases? By what rule or criterion may we determine whether or not a proceeding which is merely auxiliary to the main judgment or decree may be transferred from the state to the federal court? It is idle to say that a supplemental proceeding cannot be removed because it is an appendage or sequence of the original suit. This is, at best, but reasoning in a circle. It is as if one were to affirm that a supplemental proceeding cannot be removed because it is a supplemental proceeding. It is, in fact, substituting one form of words for another form of words. We must, if possible, find some other principle to guide our judgment in such cases. It seems to me that the true principle is this: Where the supplemental proceeding is in its character a mere mode of execution or of relief, inseparably connected with the original judgment or decree, it cannot be removed, notwithstanding the fact that some new controversy or issue between the plaintiff in the original action and a new party may arise out of the proceeding. But where the supplemental proceeding is not merely a mode of execution or relief, but where it, in fact, involves

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an independent controversy with some new and different party, it may be removed into the federal court; always, of course, assuming that otherwise the proper jurisdictional facts exist. Every court must, in the nature of things, have the right, as well as the power, to carry its own judgments into execution. To take from any court the prerogative of executing its own judgments by proper process or by supplemental proceedings, when necessary, would be to cripple its jurisdiction in a most essential matter. It would, therefore, be difficult to persuade us that congress meant by the provision in the act of 1875 for the removal of "suits of a civil nature," to authorize the transfer of controversies growing out of mere modes of execution and relief, thus directly interfering with the state courts in the execution of their own judgments. It is not in this sense that the words "suits of a civil nature" are ordinarily used.

Now, the process of garnishment after judgment is clearly a mode of *execution*. Its purpose is to obtain satisfaction of the judgment out of the debtor's effects which may be in a third person's hands. The garnishment, therefore, is inseparably connected with the judgment. If money is realized it is to be applied to the satisfaction of the judgment. Suppose that an issue, taken upon the garnishee's answer, should be removed to the federal court (the original case remaining, as it must remain, in the state court), and suppose the federal court should deliver judgment against the garnishee, and by execution or otherwise the money should be collected, how could the federal court enter satisfaction, the judgment not being under its control? We see in this the embarrassment that must arise from the attempt to separate the garnishment proceeding from the judgment, the latter remaining in one court and the former carried to another and different court.

This branch of the rule is clearly illustrated by the case of *Webber v. Humphreys*, 5 Dillon, 223. The motion in that case was manifestly a mode of execution. The plaintiff had a judgment against a Missouri corporation, and the statute

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of Missouri provided substantially that upon a return of *nulla bona* the judgment creditor might, by motion, with due notice, obtain an order from the court for execution against a stockholder to an amount equal to the balance of his unpaid stock. Here the unpaid stock is treated as assets belonging to the corporation, and the statute provides the judgment creditor with a mode of execution to reach such assets. It was held by the circuit court for the district of Missouri that the motion could not be transferred from the state to the federal court, notwithstanding the fact that there was a new controversy between the plaintiff and a new and different party.

The other branch of the rule, that there can be no removal where the supplemental proceeding is a mode of *relief* inseparably connected with the original judgment, is illustrated by the case of *Chapman v. Barger*, 4 Dillon, 557. In this case it was held that the proceeding under the occupying claimant law, for the value of improvements after judgment in ejectment, cannot be removed to the federal court. In this class of cases the statute of Iowa provides a mode of relief after judgment for the occupying claimant. Upon the filing of his petition the execution of the original judgment is to be suspended. The value of the improvements is to be ascertained, and also the value of the land aside from the improvements. The plaintiff in the main action may thereupon pay the appraised value of the improvements and take the property. If the plaintiff fail to do this after a reasonable time to be fixed by the court, the defendant may take the property upon paying the value of the land aside from the improvements, etc. Now it is obvious that this relief is inseparably connected with the judgment in the main action. A court not having the judgment in the main action under its control, could not give to the parties the full measure of relief provided by the statute; for supposing the owner of the land should pay for the improvements, he would be entitled to an execution to put him in possession of the property,

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and a writ of possession could issue only upon the judgment in ejectment.

It is obvious, therefore, that the motion to remand the first two cases above named must be sustained.

As to the third case, it stands upon wholly different ground. The proceeding in this case is not in any sense a mode of execution or relief after judgment. It does not aim to reach assets of the corporation in the hands of a stockholder or director. It seeks no relief which is inseparably connected with the judgment against the corporation. The plaintiff in his petition charges the defendants, as stockholders and directors of the corporation, with certain fraudulent acts and representations within the terms of the 1071st section of the code of Iowa, and prays judgment for damages as provided for in that section. The section is as follows:

“ Intentional fraud, in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or their liabilities, shall subject those guilty thereof to fine and imprisonment, or both, at the discretion of the court. Any person who has sustained injury from such fraud may recover damages therefor against those participating in such fraud.”

Here is a distinct and independent cause of action given by the last clause of the section. The plaintiff's allegations are founded upon facts which he claims bring him within the terms of this section. The gravamen of his action is fraud, and he prays judgment for damages. It may have been necessary for him to set out the judgment and show that an execution has been returned unsatisfied, to meet the conditions of the 1083d section, but the judgment is not the foundation of his action. He has a controversy with new parties distinct from that upon which the judgment was rendered. He seeks to establish a new liability against these new parties.

It is further argued by defendant that this action cannot be maintained here because it is in the nature of an action to

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enforce a statutory penalty. To this the answer is that it is not an action to recover penalties, but unliquidated damages. It is a civil, not a penal action. Its object is not punishment, but indemnity for a civil injury. It is to no purpose to say that the same section of the statute provides for the punishment of the offense committed by the defendants as a crime. It is not unusual for the same statute thus to provide for indemnity by civil action to the individual injured, and protection to the public by penal action and indictment.

The motion to remand in this case is denied.

Reed & Marsh and *Willetts & Willetts*, for the motion.

Martin, Murphy & Lynch and *Brown & Wellington*,
contra.

MEMPHIS & ST. LOUIS PACKET CO. v. THE H. C. YAEGER
TRANSPORTATION CO.

(*Eastern District of Missouri. February, 1882.*)

1. COLLISION — DIVISION OF DAMAGES.—Where, in case of a collision between two vessels, there is mutual fault, the damages should be equally divided between the owners.
2. SAME — MEASURE OF DAMAGES — REPAIRS — DETENTION.—The damages to be divided in such cases are those necessarily resulting from the collision. If repairs are necessitated their actual cost should be taken into account. If the injured vessel is bound on a voyage and is detained by reason of the collision, the loss from detention also constitutes part of the damages.

In admiralty. Appeal.

McCARY, *Circuit Judge*.—This is a case of collision. The court has heretofore affirmed the finding below that there was mutual fault, and that the damages should, therefore, be equally divided between the owners of the two colliding vessels. At the request of counsel a reargument has been had upon the question, whether in such a case demurrage, or charges for loss of the use of the injured vessel while undergoing repairs, should be allowed as part of the damages to

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be divided. Appellant's counsel insist that, both parties being in fault, the only damages to be apportioned are the actual injury to the vessels; or, in other words, the actual cost of repairs. But no case is cited in which it has been so decided, and I think a fair construction of the rule as laid down by the supreme court requires that we give to the word "damages" its ordinary meaning. The leading case in this country upon the subject is that of the *Schooner Catharine v. Dickinson*, 17 How. 170, in which the rule is thus stated: "We think the rule *dividing the loss* the most just and equitable, and as best tending to induce care and vigilance on both sides in navigation." In subsequent cases arising in that court this rule is followed, and substantially the same language used to express it. It is sometimes said that the damage done to both ships is to be added together and the sum thereof equally divided. But this language is never used in such connection as to lead to the inference that nothing but the actual cost of repairs is to be taken into account. By the word "loss" or "damages" I understand the supreme court to mean the injury directly and necessarily resulting from the collision. If a vessel be bound upon a voyage, and is, by reason of a collision, detained, the loss from detention is a part of the damages resulting from the collision; and if she is disabled by such collision, so that repairs are necessary, the actual cost of such repairs is likewise part of the damages. And in either case such loss or damage is to be paid by the party solely in fault, if the fault be all on one side, or to be divided if the fault be mutual. In both cases the rule as to what is "loss" or "damages" is the same. It is the injury necessarily resulting from the collision. This is the view taken of the rule by Lowell, J., in the case of *The Mary Patten*, 2 Low. 196. The motion for rehearing is overruled, and the order affirming the decree of the district court is adhered to.

Noble & Orrick, for libelants.

Henderson & Shields, for respondents.

Rutz v. City of St. Louis.

RUTZ v. CITY OF ST. LOUIS.

(*Eastern District of Missouri. February, 1882.*)

1. **RIPARIAN RIGHTS — DIKES — DAMAGES.**—Where a city, by authority of an act of the legislature of the state in which it is situated, builds a dike extending into a navigable river, owners of land on the opposite shore and in another state, who suffer no loss in consequence of the erection of the dike, cannot maintain actions against the city for damages.

Action for damages alleged to have been sustained in consequence of the defendant building a dike extending into the Mississippi river.

Upon the trial of this case, without the intervention of a jury, the court finds the facts to be:

That prior to 1874, and for several preceding years, the current of the Mississippi river was constantly eroding the east river bank, owned by the plaintiff. Between that bank and the Missouri shore was an island, known as Arsenal island, the main channel of the river in 1874 being between said island and the Missouri shore, and immediately along the latter. Under an act of the Missouri legislature, and pursuant to an ordinance of the defendant city under said act, with the view of improving the harbor of said city, a dike was built by it in 1874 known as the Bryan-street dike, extending into the Mississippi river and the main channel thereof seven hundred feet towards said island from the Missouri shore. The distance from the Missouri shore to the island, the head of which was above the dike, was two thousand four hundred feet. Several witnesses were of opinion that the tendency of said dike was to deflect the current of the river to the east of the island and erode the bank owned by plaintiffs, which, as the evidence showed, had been washed away to the extent of thirty-seven acres or more, valued at \$300 per acre. Other witnesses testified that the main channel and current of the river, after the building of the dike, continued actually to flow along the Missouri shore, hugging the end of the dike,

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and was not deflected to the east of said island; nor was there any increased volume of water caused by said dike flowing along the Illinois shore. The dike in question has been since removed, at the instance of United States engineers, and a new dike built by the United States, connecting said island with the Illinois shore above plaintiffs' land, and closing the "chute" there for all navigable purposes. The necessary effect of the United States dike is to fill up the east "chute," so that large accretions will follow. In the light of the testimony the court finds that plaintiffs' land was not washed away in consequence of the dike built by defendant. The court declares the law to be, that under the foregoing facts the plaintiffs are not entitled to recover. This ruling is based on the fact that the dike built by the defendant did not damage the plaintiffs. If it had done so, then the plaintiffs would have been entitled to recover to the extent of the injury sustained. Judgment for defendant.

Thomas C. Fletcher, for plaintiffs.

Leverett Bell, for defendant.

THAT, *District Judge*.—Many propositions have been submitted to the court which are of large moment connected with the navigation and improvement of the Mississippi river. Time does not permit a detailed review of the many authorities on the subject. To enter upon that field of inquiry would compel an exhaustive consideration of the many decisions of state courts bordering upon the Mississippi river, and of the United States supreme court with reference thereto. The eastern boundary line of Missouri, for certain purposes, is to the middle of the main channel of the river. In the absence of a federal statute the state of Missouri could authorize improvements on the Missouri shore to be erected by state, municipal, or other organizations; and the same legal right exists in the state of Illinois.

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It is clear that no supposed authority by either state could justify the destruction or substantial impairment of the navigation of the river, which is free and common to all the states. In the absence of federal legislation whatever, a state permit is necessarily subordinate to the general easement or rights of navigation. It is a well known physical law that the frequent changes of the channel are dependent on transient conditions, so that safe navigation exacts, in the absence of artificial aids, constant observation of natural effects and changes. The channel may be one year in one direction, and in another year in a different direction. The one or the other alluvial shore may be alternately eroded. The contraction of the channel, artificially, causes a scouring, whereby, greater depth being obtained, the same volume of water passes in the contracted channel. If the flow of water is extended over great width, bars and islands are formed, shifting constantly as freshets, and low water occur. Thus Arsenal island, under the changing currents, has shifted downward during the last fifty years for two or three miles. As the head of the island is washed away the foot of the island is enlarged. So this island has been gradually traveling southward, until an effort is now being made under United States authority to give it permanence, for the benefit of both those on the Illinois and the Missouri shores.

At the time of the grievances complained of, many structures had been contrived on both shores, some under local and some under United States authority, the design of which was to control the current in such a way as to benefit the harbor of St. Louis on the one side, and be of equal advantage to the Illinois shore and its proprietors on the other side. The effect of these dikes on the Illinois side has been to add, by accretions, untold wealth to riparian owners there, although their previously precarious shore lines or landings disappeared. In the matter of dollars they have been enriched, and could not show that any damages were recoverable by what, lawfully done, had been of vast monetary benefit to them.

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In the case before the court it was proved that prior to the construction of the Bryan dike there was a constant erosion of plaintiffs' land from natural causes, more or less of the current passing along the bend of the river east of the island. Witnesses testified that the effect of the dike was to deflect from the Missouri side of the island to the Illinois side an increased volume of water, whereby the abrasion would be accelerated. On the other hand, those daily engaged in the navigation of the river swore as matters of fact that no such result occurred. It must be borne in mind that the Bryan dike was on the Missouri shore below the head of the island, and that the current of the river hugged the Missouri shore around the head of the dike, necessarily scouring the bed of the channel to give greater depth for the outflow of the water. If the dike had been above the head of the island, and had thus deflected the body of the water, or any considerable portion thereof, into the "chute" east of the island, the plaintiffs' theory would be tenable; but the dike was below the head of the island, and its natural effect would be to wash away the west side of the island and not the shore east of the island. However that may be, it is evident that the improvements undertaken and abandoned by the defendant, at the instance of Illinois proprietors and the United States authorities, did not damage the plaintiffs. And it is also clear that the subsequent improvements by the United States authorities in constructing a dike across the "chute," while destroying a navigable front there, has tended to check erosion and to give vast accretions to the benefit of the riparian owner.

It is admitted that no one has a right to benefit himself to the injury of another; and that when a riparian owner on one side of the river seeks by dikes, or otherwise, to secure an improvement of his property, he must do so without obstructing the navigability of the river or destroying the property of the riparian owner on the opposite shore. The uncertainty of shore lines and of the shifting channels of

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the river, together with the formation of "tow-heads," sand-bars and islands, are incidents to the possession of lands bordering on the river. Along the Missouri and Mississippi rivers, for hundreds of miles, these changes occur annually to a greater or less degree from natural causes. It might be difficult to determine in many cases whether "rip-rapping" or other protection by a riparian owner of his own property did not cause, in saving his own property, a deflection of the current, whereby an erosion might occur elsewhere. Must it be contended that he cannot legally provide against the destruction of his own property; that he must suffer his acres to be swept away in order that some other person may profit from his loss? Such an inquiry, however, is not pertinent to this case. It must suffice that the dike built by the defendant was lawful, and did not damage plaintiffs.

Many authorities are cited which have more or less bearing on this case, notably: *Atlee v. Packet Co.* 21 Wall. 389; *Boom Co. v. Patterson*, 98 U. S. 403; *Pennsylvania v. Wheeling Bridge Co.* 13 How. 518. See, also, *Moffit v. Brewer*, 1 Greene (Iowa), 348; *Hosher v. Railroad Co.* 60 Mo. 333; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Benson v. Morrow*, 61 Mo. 345; *Crosby v. Hanover*, 36 N. H. 404; *Transp. Co. v. Chicago*, 99 U. S. 635; *Lee v. Pembroke Iron Co.* 57 Me. 481; *Cogswell v. Essex Mill Co.* 6 Pick. 94; *Thacher v. Dartmouth, etc.* 18 Pick. 501; *Comins v. Bradbury*, 1 Fairf. 447; *Crittenden v. Wilson*, 5 Cow. 165; *Rippe v. Railroad*, 28 Minn. 18; *Dutton v. Strong*, 1 Black, 23; *Yates v. Milwaukee*, 10 Wall. 497; *Pumpelly v. Green Bay Co.* 13 Wall. 166; *Ten Eyck v. Canal Co.* 18 N. Y. L. 200; *Avery v. Fox*, 1 Abb. (U. S.) 246; *Hatch v. Railroad*, 25 Vt. 49; *Rowe v. Granite Bridge Co.* 21 Pick. 344; *Railroad v. Stein*, 75 Ill. 45; *Meyer v. City of St. Louis*, 8 Mo. App. 266.

The last case cited lays down correct rules for the case then before that court; but the same are not applicable either to the law or facts now under consideration. Of course an improvement by a city for public purposes, whereby

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private property is taken, must be accompanied with compensation, as under the law of eminent domain. If the defendant had actually destroyed, for its own benefit, plaintiffs' property, it would be bound to respond in damages. But its alleged improvements, however absurd for its own supposed benefit, did not injure plaintiffs' property, even temporarily. Indeed, what has since occurred demonstrates that the plaintiffs have suffered no damage from the action of the defendant, but that they may incidentally profit largely therefrom. Whether that be so or not, the fact remains that the dike did not cause plaintiffs' property to be washed away, and that what occurred in consequence thereof, under United States authority, may or may not be of benefit to them, but certainly gave them no cause of action against the defendant.

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(*Eastern District of Missouri. January, 1882.*)

1. CONSTITUTIONAL LAW — INFAMOUS CRIMES — ARTICLE 5 OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES CONSTRUED.— No crime is infamous, within the meaning of article 5 of the amendments to the federal constitution, unless expressly made infamous or declared a felony by an act of congress.
2. SAME — SAME — STEALING FROM THE MAIL — PRACTICE — INFORMATION.— Stealing from the mail is not an infamous crime, and may be prosecuted by information.

Motion in arrest of judgment.

TREAT, *District Judge*.— An information was filed against the defendant, under the second clause of section 5469, R. S., which section is as follows:

“Any person who shall steal the mail, or shall steal or take from or out of any mail or postoffice, etc., any letter or packet; any person who shall take the mail, or any letter or

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packet therefrom, or from any postoffice, etc., with or without the consent of the person having custody thereof, and open, embezzle, or destroy any such mail, letter, or package which shall contain any note, bond, etc.; . . . any person who shall by fraud or deception obtain from any person having custody thereof any such mail, letter, etc., although *not* employed in the postal service, shall be punishable by imprisonment at hard labor for not less than one year and not more than five years."

Under said information the defendant was tried before a jury and found guilty.

The court assigned as counsel for the defendant, Messrs. Bakewell and Stewart, who have assiduously attended to the case, and presented to the court, in the light of authorities and argument, their views of the law which should govern United States courts in this class of vexed and undetermined cases. With equal diligence the counsel for the United States have prosecuted the controversy.

The first question is, what, under the fifth amendment of the United States constitution, is an infamous crime? and the second, whether the offense charged is within that provision. Within a few years past there has been much discussion of the main question, and several decisions by the United States courts, each of which encounters and endeavors to solve, at least to a limited extent, the many and important difficulties involved. They are too numerous for detailed analysis or review. Many of them fully consider what at common law were infamous crimes, and proceed on the theory that if a like offense exists under United States statutes, it must be considered "infamous" under the federal statutes. Hence, the elaborate review in such cases of the common law, and British statutes existing at the date of the United States constitution, and original amendments thereto. Counsel in this case have in the most praiseworthy manner presented the whole line of English decisions and authority on this subject, which, if conclusive or persuasive, would have an essential bearing on the question.

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At the date of the United States constitution there were no federal offenses except, impliedly, treason. The fifth amendment refers to "capital offenses and other infamous crimes." Were those offenses which at that time were capital or infamous at common law to be considered as within the purview of that amendment, if thereafter congress chose to specify offenses against the United States, and did not denounce capital or infamous punishment on conviction thereof? Of the many offenses at common law, and by British statutes, which were capital, very few were even made federal offenses or punishable capitally. Hence, in this particular, it must be conceded that there was not embraced in the purview of the constitution any offenses denominated "capital," except those which might thereafter be so declared by congressional enactment. If this be so, why should a different rule obtain as to the so-called "infamous crimes" designated in the same amendment? The rule governing the two should be the same.

If regard is had to the then existing common law and British statutes, as fully explained in the cases cited, it may be considered as settled that treason, felony, and the *crimen falsi* were infamous. To every student of legal history it is well known that many offenses now considered trivial, comparatively, were in England denominated felonies, and once made capital, while many other and graver crimes were designated misdemeanors, and followed by milder punishments. As at the date of the constitutional amendments it remained for congress to name offenses and prescribe punishment therefor, is it to be held that every offense by it defined must take either its classification or punishment *ex necessitate* from the English system, or solely from congressional provisions?

Originally a felony was an offense which was followed by forfeiture, yet a century ago the English courts repudiated that test, and so have the American courts since. It is said that it is not the grade of the punishment, but the nature and quality of the offense, which must determine its classi-

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fication. If so the rule is very uncertain. Many offenses comparatively trivial were felonies, and punishable at common law with death and forfeiture, which at the present time are not felonies or so punishable either in England or the United States. It must be observed that the constitutional amendment under review does not use the word "felony." True, at common law all felonies were infamous, but as the constitution did not adopt the penal code of the common law, and as consequently there are no common law crimes against the United States, how does it happen that whatever was in common law a felony comes to be infamous when an offense of like nature is declared to be an offense — but not a felony or infamous — against the United States, punishably only as the latter had enacted.

Although forfeitures ceased to be the consequence of most felonies before the adoption of the United States constitution, yet the designation "felony" remained. Still, are we to hold that all felonies under the United States constitution and statutes are to be held infamous, notwithstanding their position before the law have been essentially changed? Section 5326, R. S., declares that "no conviction or judgment shall work corruption of blood or any forfeiture of estate." Again, under the head of *crimen falsi*, offenses were infamous which were followed with disqualification as witnesses or jurors. Many offenses which, under the English system, involved such consequences, do not do so now under many American codes, and especially under the federal laws. So far as observation goes there are but two offenses expressly denounced by federal statutes as infamous within the meaning of the common-law definition, yet there are disqualifications for offices in a few others.

Shall all offenses, then, involving moral turpitude, be held technically infamous? What shall be the test, the punishment, or the quality of the act? Most modern jurists agree that the nature of the punishment is not the criterion, and yet many of them attempt to draw a sharp distinction at

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the walls of the penitentiary. If the nature of the punishment does not affect the question, why is it that they make imprisonment in the penitentiary infamous and not imprisonment in the common jail? All familiar with federal statutes and practice know that persons convicted can, in many instances, be sentenced to imprisonment, with or without hard labor, either in a jail or penitentiary.

It is very difficult to reconcile the cases, or to reach a definite conclusion therefrom. In this circuit it has lately been held that the punishment does not give character to the offense, although the later decisions are not in accord with what theretofore had been held. If the extent or place of punishment does not affect the question, how is it that the walls of the penitentiary can make a dividing line between infamous and non-infamous crimes? It must be confessed that the rulings of this circuit for more than twenty years on this subject were overthrown by the *Maxwell* and other cases, and properly so. Hence, the test is not where the criminal may be imprisoned, nor what at common law would have been the designation of the offense, but what the federal statute prescribes. It is very difficult to understand logically what rule should be observed, in the light of many decisions. Shall the courts pronounce that every felony is infamous, merely because the United States statute denominates a specific offense a felony, when no such offense was known to the common law, and consequently could not be infamous when the constitution was adopted? On the other hand, if congress prescribes an offense and does not denominate it a felony, and yet the very nature of the offense is one of moral turpitude, but the punishment not infamous, can the court say it is infamous, to be pursued only through indictments?

It will be seen that great embarrassments exist, which have perplexed the courts, arising not from the constitutional provision alone, but from United States statutes.

Only two offenses have denominated expressly against

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them disqualifications which are within the technical definition infamous, unless all felonies are to be so considered, and certain offenses under the election laws pertaining to disqualifications for office. It may be very difficult to reconcile cases with right reason on this subject, and such an effort will be foreborne. Without criticising such cases, and analyzing them, it may be wiser to state generally the conclusions reached, and to give the elemental thoughts on which such conclusions rest.

As at the date of the constitution there were no offenses under the federal law, with the possible exceptions named, is not the character of each offense thereafter prescribed to be determined solely by the statute? Within recognized rules a felony is infamous, and in the absence of such a designation the offense is not a felony. Hence, if an offense against the United States is defined, and the same is not denominated a felony, and no infamous punishment is denounced, how can a court decide that offense to be without the constitutional provision? Was it the purpose of the constitution to make all offenses that congress might thereafter prescribe, to take their quality, not from congressional legislation, but from the common law? If so, was not the power of congress restricted as to offenses not known to the common law? So far as their penal consequences might extend — that is, if congress enacted that certain defined acts should be an offense against the United States, and attached thereto consequences which were infamous,— were they not to be so, although there was no common-law rule on the subject? In other words, could not congress declare what offenses it enacted infamous or non-infamous, as it may deem wise?

This suggestion leads up to the main inquiry whether congress was inhibited from making any offense a felony or infamous which the common law or British statutes did not recognize as such. The statement of the proposition shows its absurdity, for none of the common-law or statutory offenses (British) were United States offenses. Whatever

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congress might enact thereafter would take its character, quality and punishment solely from the congressional enactment. Although courts would look for the definition of terms used, if they were common-law terms, to the common law, yet they could not enlarge the punishment beyond what the federal statutes prescribe. Similar offenses may have been capital under the British law. Yet congress may have denounced therefor imprisonment merely for a limited term, or merely a fine. How, then, is the offense to be designated — according to the federal statutes, which must alone govern, or according to the common law, which is no part of the federal system?

Without pursuing further this abstract line of thought, which leads to a *reductio ad absurdum*, it may be well to state succinctly the views of this court. At the adoption of the United States constitution, and the amendments thereto, inasmuch as no federal offenses had been defined, it was prescribed that whenever congress should declare certain acts an offense, and attach thereto capital punishments or infamy, the alleged offender should not be brought to trial except after indictment.

The nature, functions and protective duties of a grand jury have been often defined and enforced by this court. But the question under consideration is, when is the interposition of such a jury essential? It may be stated that the following rules should prevail:

(1) In the absence of a federal statute there is no offense cognizable by United States courts.

(2) When congress has declared an offense, it is what congress has designated it, and not what any other system of jurisprudence or foreign statutes may prescribe.

(3) If the congressional statute prescribes infamy, the offense is infamous.

(4) If congress does, without express provisions as to infamy, make the offense a felony, the offense must be prosecuted as infamous and by indictment.

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Under this head it must be observed that common law felonies, or offenses of like nature, are not within the purview of the constitution unless congress so enacts. The many offenses under the British law, with their barbarous consequences, were not, and in some instances (notably, treason) could not be, federal law. By recognized decisions and definitions all felonies were infamous, but as there were no felonies here until congress so enacted, whatever offenses congress denounced, not as felonies, but as misdemeanors, could not fall within the description of infamous unless, independent of the technical definition of "felony," they fell within the rule of infamous punishment, so expressly denounced; or, possibly, from the quality or nature of the offense, as *crimen falsi*. As to the latter, this court holds that the federal statute must alone prevail.

(5) If there are no felonies under the federal law except what the federal statutes so denominate, what other federal offenses are infamous? As has been already stated, there are only two statutes which denounce infamous punishment; that is, disqualification within common-law rules. Considering the nature of the United States government and its limitations of authority, what offenses and consequences thereof can obtain within its jurisdiction beyond what congress enacts? It cannot borrow authority from England or from any of the states within the Union. It may be that British statutes or law and state statutes measure certain offenses against their authority very differently from federal statutes; may denounce against them punishments of infamy or otherwise, while the federal statutes treat like offenses as trivial. United States courts are bound to follow United States statutes, and no other, in criminal cases.

It has been urged with force that as United States courts are bound as to rules of evidence in civil cases to follow the state authority, that, therefore, if certain offenses under state laws are made infamous, the United States courts should consider infamous cases of like quality as to turpitude

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under the federal law. But is not this a begging of the question? The diversity or incongruity of federal legislation in that respect need not be discussed, whereby what is a rule of evidence in one United States court may not be the rule in another, and whereby United States courts are not governed by a uniform law enacted by congress, but are made subject to local legislation, contrary to the spirit of federal jurisdiction and authority. It must suffice, however, that no state legislation can enlarge or restrict federal authority, nor can such legislation create or qualify a federal offense. Each state may, for purposes of its own, designate what shall be considered offenses against its authority, and characterize them as felonies or otherwise; but its legislation in such respects cannot override federal laws, or supply their supposed defects, in matters exclusively within federal cognizance; hence, United States courts cannot look to state legislation for assistance. If, then, congress passes a statute against frauds of various kinds, which, under the common law, would fall respectively under the designation of infamous or non-infamous, should a United States court fall back on the common law to ascertain the nature and quality of this newly-created offense, and attach consequences which congress has not done? These questions have generally been discussed as if whatever offense congress declared was to be considered, not as what congress enacted, but as what like offenses by analogy were considered at common law or by state statutes. At this point the logical difficulty occurs. If congress alone can say what shall be an offense under the United States laws and prescribe the punishment therefor, how can the courts go beyond such congressional enactments? What, then, independent of felonies, shall be considered in the United States courts infamous crimes, within the meaning of the fifth amendment of the constitution? The answer should be, such offenses and such only as congress has declared to be infamous. Whence does a United States court derive authority in criminal cases to go beyond the United

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States statutes? Hence cases not declared felonies or infamous can be prosecuted by information. It is true that congress in its wisdom has chosen to denominate many trivial offenses, involving no moral turpitude, felonies, and not so to denominate many of the gravest crimes; yet the courts are bound thereby. In these, as in many other matters, courts can only say: *Sic ita lex scripta est.*

After careful examination of the many authorities cited, English and American, it seems that the true solution of the vexed question must be found in the fact that there are no federal offenses except such as congress prescribes, and that if congress declares an offense capital or infamous, the accused has a right to exact the intervention of a grand jury. This rule is to be taken with the qualification that all declared felonies are to be construed infamous. If congress does not choose to declare an offense a felony, or make it infamous, it cannot be so considered in a United States court.

These views may not be in accord with those expressed by some courts, and especially by those who decide that the quality or character of the offense is or is not to be determined by the punishment. After felonies under the British law had been specifically defined as determinable solely by the consequent punishment, the English courts adopted another rule, which has been generally followed in this country, whereby the nature of the punishment was held not to determine the character of the offense. Still the struggle remains under federal statutes whether, in the absence of a designation of the offense as a felony or misdemeanor, the court should look to the prescribed punishment to ascertain the true classification. Many acts of congress prescribe hard labor or imprisonment in the penitentiary, with or without hard labor for a defined term, or imprisonment solely, or fine and imprisonment, etc., in most instances leaving the place of the imprisonment in the discretion of the court. Is it, then, to be held as a legal proposition that imprisonment in the penitentiary, which is often at the discretion of the

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court, makes the offense infamous, whereas if, in its discretion, the imprisonment were ordered to be in the common jail, it would be non-infamous? Again, if the imprisonment ordered is for more than a year, although hard labor is not denounced, yet the sentence may be to the penitentiary. Shall such shifting, discretionary and arbitrary rules settle the important constitutional question presented? That is, if the court chooses to make the place of imprisonment, on conviction, in the penitentiary, the offense is infamous; otherwise not. Suppose trial and conviction had on an information under any of the many statutes, where it is in the discretion of the court to sentence to the common jail or to the penitentiary, or to fine and imprisonment, or imprisonment alone, with or without hard labor, etc., and the court in its discretion sentences to the penitentiary, does the offense thereby become infamous; whereas, if the sentence had been to the jail or to payment of a fine it would have been non-infamous?

But all are of the opinion that it is not, as a general rule, the punishment which determines the nature of the offense, and if it were not so the absurd result would follow that in the cases above supposed the character of the offense would not depend on its intrinsic quality, but on the discretion of the judge who passes sentence. These extreme illustrations are presented in order to show the importance of having some well-defined rules which all can understand.

It has been deemed better not to pass through a careful analysis of the many cases cited, or to review the same, but to present the subject with its attendant difficulties.

The conclusions reached are that under the United States constitution and statutes there are no infamous crimes except those therein denounced as capital, or felonies, or punished with disqualification as witnesses or jurors. If congress makes an offense infamous, it must be prosecuted through indictment; if it makes it non-infamous, it can be pursued through information. This necessarily follows from the fact

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that under the United States constitution there are no criminal offenses other than what congress prescribes, and unless it declares directly or inferentially that an offense is infamous it must be pronounced otherwise. There is no other safe or consistent rule.

A reference, therefore, to the statute, cited at the beginning of this opinion, makes it clear that the offense charged is not infamous within the rules herein stated. The fact that imprisonment "at hard labor" is denounced does not make the offense infamous within the purview of the constitution, and consequently the case was rightly tried on information.

The motion in arrest is overruled.

Drummond & Smith, for the United States.

Paul Bakewell and *G. M. Stewart*, for defendant.

NOTE.—The question discussed in the foregoing opinion was subsequently taken to the supreme court upon a certificate of division of opinion.

The cases cited and examined are appended:

Wheaton v. Peters, 8 Pet. 591; *U. S. v. Reid*, 12 How. 364; 1 Kent. Comm. *336, 837; Coke, Litt. 6, *a b*; Blackstone, *370; Phil. Ev. vol. 1, p. 22, note; 1 Chit. Crim. Law, *600, *601, p. 599; Phil. Ev. 23, note; *People v. Whipple*, 9 Cow. 707; *Clark's Lessees v. Hall*, 2 Harris & Mo-Henry, 378; *People v. Herrick*, 13 Johns. 82; *Cushman v. Loker*, 2 Mass. 106; 1 Stark. Ev. 94, 95; 2 Hale, 227; 1 Bish. Crim. Law, §§ 743, 580, 581, 584, 621, 974; 1 Greenl. Ev. §§ 372, 373, p. 15; *Pendock v. Mackender*, 2 Wilson, 18; Coke, Litt. 391*a*, *6*b*, note 1; 4 Bl. Com. 94, 95, 230; 1 Russell, Crimes (Graves' ed.), 44, 46, 47; *Rex v. Priddle*, Leach, 442; 2 Hale, P. C. 277; *Rex v. Davis*, 5 Mod. 75; 8 Wilson's Works, 371, 377; 1 Hale, P. C. ch. 43, p. 503; Willis, 665; *State v. Gardner*, 1 Root (Conn.), 485; *Com. v. Keith*, 8 Met. (Mass.) 531; *Lyford v. Farrar*, 11 Foster (N. H.), 314; *U. S. v. Maxwell*, 3 Dill. 275, 278; *In re Truman*, 44 Mo. 181; *Fox v. State*, 5 How. 410, 438; *Moore v. State*, 14 How. 13; *U. S. v. Shepard*, 1 Abb. 436, 440; *U. S. v. Magill*, 1 Washb. 464, 465; *U. S. v. Hawthorne*, 1 Dill. 422; *State v. Keyes*, 8 Vt. 65, 66; 5 Watts & Serg. 342; *U. S. v. Hudson*, 7 Cranch, 34; *U. S. v. Lancaster*, 2 McLean, 431, 433; *U. S. v. Wiltberger*, 5 Wheat. 76, 93, 96; *U. S. v. New Bedford Bridge*, 1 Wood & M.

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401; *State v. Stephenson*, 2 Bailey, 834; *U. S. v. Wilson*, 4 Blatchf. 435; Sergeant's Const. Law, 845; *U. S. v. Coolidge*, 1 Wheat. 415; *U. S. v. Beavens*, 3 Wheat. 336; *U. S. v. Burr*, 4 Cranch, 500; *Marhney v. Madison*, 1 Cranch, 176; 4 Tucker's Blackstone, No. 10 of appendix; Conkling's Treatise, 83; *U. S. v. Cross*, 1 McArthur, 149; *U. S. v. Coppersmith*, 4 Fed. Rep. 198; *U. S. v. Sheperd*, 1 Hughes, 520; *U. S. v. Block*, 4 Sawy. 212; *U. S. v. Yates*, 6 Fed. Rep. 861; *U. S. v. Baugh*, 1 Fed. Rep. 784; *U. S. v. Waller*, 1 Sawy. 701; Whart. Crim. Law (3d ed.), 354 *et seq.*; 11 Am. Jur. and other authorities cited; *U. S. v. Okie*, 5 Blatchf. 516; *U. S. v. Clark*, Crabbe, 584; *U. S. v. Golding*, 2 Cranch, 212; *U. S. v. Patterson*, 6 McLean, 467, 468; *U. S. v. Mills*, 7 Pet. 138; *U. S. v. Clayton*, 3 Dill. 226; *Wilson v. State*, 1 Wis. 189; *Com. v. Barlow*, 4 Mass. 439; *Com. v. Macomber*, 3 Mass. 257; Star Route Cases, unreported.

UNITED STATES v. BURGESS.

(*Eastern District of Missouri. January, 1882.*)

1. CONSTITUTIONAL LAW — INFAMOUS CRIMES — CONSPIRACY TO MAKE COUNTERFEIT COIN — PRACTICE — INFORMATION. — A conspiracy to make counterfeit coin is not an infamous crime, within the meaning of article 5 of the amendments to the United States constitution, and may be prosecuted by information.

Motion in arrest of judgment.

TREAT, *District Judge*. — An information was filed against the defendant for conspiracy to make counterfeit coin, whereupon a trial was had, and conviction followed. Many of the points considered in the preceding case of *Wynn* are involved in the question now presented. So far as the views of the court are stated in that case, they need not now be repeated.

Under the common law a conspiracy was not infamous unless it was for the subversion of justice, by the obstruction of its administration through perjury, subornation of perjury, spiriting away of witnesses, etc. Hence, if a like offense is by congressional enactment denounced a crime, without at-

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tendant consequences involving infamy, the same can be prosecuted by information.

If the common-law rule were to obtain, the crime charged would not be infamous, inasmuch as the alleged conspiracy, under section 5440, R. S., is not to subvert or obstruct the administration of justice through its administration in the courts.

It has been forcibly urged that a conspiracy to commit a felony which, if committed, would fall within the rule of *crimen falsi*, should, under the statute (5440) as to overt acts, be held to come within that rule. By what has been said in the case of *Wynn*, no such rule would prevail. If congress denounces a specified offense a felony, it is so; not because like offenses were such under the English law, but because congress chose so to make it. In this case, to commit which offense the conspiracy is charged, strange to say, the acts of congress have been frequently changed. In England there was, for technical reasons, a marked distinction between false coining and passing false coins. In the early statutes of the United States, counterfeiting coin was declared to be a felony, but in the re-enactment of these statutes subsequently, the words "shall be adjudged guilty of a felony" were dropped. Hence, what was once a felony by force of the United States statutes has ceased to be so through subsequent legislation. Independent thereof it must be considered that no conspiracy at common law was infamous except such as pertained to the subversion of justice. The conspiracy charged, for which the defendant has been found guilty on information, was not a conspiracy even to cause a felony to be committed, or to subvert the administration of justice. Still, under the rulings in *Wynn's Case*, if the conspiracy charged was not by act of congress declared infamous or a felony, the offense was rightfully prosecuted by information. Even if it had been a conspiracy to cause a felony to be committed, it would still be a simple misdemeanor.

The motion for arrest is overruled.

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Drummond & Smith, for the United States.

Paul Bakewell and *E. M. Stewart*, for defendant.

Cases cited and examined: Section 5440, R. S.; Act April 21, 1806 (2 St. at Large, 404, 405; 4 St. at Large, 121; 13 St. at Large, 120); 3 Cox Crim. Cas. 229; 4 Ward, 265; Cooley, Blackstone, 136; 13 Johns. 82; *In re Ville*, 2 Dod. 174; 12 Ward, 209; 2 Bish. 176; and those noted in *Wynn's Case*, ante, 277.

CHICAGO, MILWAUKEE & ST. PAUL R'Y Co. v. SIOUX CITY
& ST. PAUL R. Co. and others.

(District of Iowa. January, 1882.)

1. RAILROAD LAND GRANTS.—When the limits of two congressional railroad land grants made in the same act overlap, and there is no express priority in the disposition of such lands, or provision for the same, *held*, that each of the two railroads is entitled to an undivided half of the land.

The complainant in this bill asserts title as against the respondents to certain lands in Osceola, Dickinson and O'Brien counties, in the state of Iowa, amounting to one hundred and eighty-nine thousand one hundred and eighty-four and fifty-nine one-hundredth acres. The controversy concerns the overlapping or conflicting limits of two congressional railroad land grants made in the same act without express priority in or provision for the disposition of the overlapping lands. The conflict occurs at and near the intersection of the two railroads claiming the land. The disputed lands all lie within the limits prescribed by the acts of congress from the line of both roads. The congressional grant is contained in the act approved March 12, 1864, as follows:

“CHAPTER 84.

“AN ACT for a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of a railroad in said state.

“*Be it enacted by the senate and house of representatives of the United States of America, in congress assembled*, That there be and is hereby granted to the state of Iowa, for the pur-

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pose of aiding in the construction of a railroad from Sioux City, in said state, to the south line of the state of Minnesota, at such point as the said state of Iowa may select between the Big Sioux and the west fork of the Des Moines river; also to said state for the use and benefit of the McGregor Western Railroad Company, for the purpose of aiding in the construction of a railroad from a point at or near the foot of Main street, South McGregor, in said state, in a westerly direction, by the most practicable route, on or near the forty-third parallel of north latitude, until it shall intersect the said road running from Sioux City to the Minnesota state line, in the county of O'Brien, in said state, every alternate section of land designated by odd numbers for ten sections in width, on each side of said roads; but in case it shall appear that the United States have, when the lines or routes of said roads are definitely located, sold any section or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the secretary of the interior to cause to be selected, for the purpose aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands thus indicated by odd numbers and sections, by the direction of the secretary of the interior, shall be held by the state of Iowa for the uses and purposes aforesaid.

"SEC. 2. *And be it further enacted,* That the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said roads shall not be sold for less than double the minimum price of public lands when sold; nor shall any of said lands

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become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the minimum price as aforesaid.

"SEC. 3. *And be it further enacted*, That the lands hereby granted shall be subject to the disposal of the legislature of Iowa for the purposes aforesaid, and no other; and the said railroads shall be and remain public highways for the use of the government of the United States free of all toll or other charges upon the transportation of any property or troops of the United States.

"SEC. 4. *And be it further enacted*, That the lands hereby granted shall be disposed of by said state for the purpose aforesaid only, and in manner following, namely: When the governor of said state shall certify to the secretary of the interior that any section of ten consecutive miles of either of said roads is completed in a good, substantial and workmanlike manner as a first-class railroad, then the secretary of the interior shall issue to the state patents for one hundred sections of land for the benefit of the road having completed the ten consecutive miles as aforesaid. When the governor of said state shall certify that another section of ten consecutive miles shall have been completed as aforesaid, then the secretary of the interior shall issue patents to said state in like manner for a like number; and when certificates of the completion of additional sections of ten consecutive miles of either of said roads are from time to time made as aforesaid, additional sections of land shall be patented as aforesaid until said roads, or either of them, are completed, when the whole of the lands hereby granted shall be patented to the state for the uses aforesaid, and none other; provided, that if the said McGregor Western Railroad Company, or assigns, shall fail to complete at least twenty miles of its said road during each and every year from the date of its acceptance of the grant provided for in this act, then the state may resume said grant and so dispose of the same as to secure the completion of a road on said line and upon such

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terms within such time as the state shall determine; provided further, that if the said roads are not completed within ten years from their several acceptance of this grant, the said lands hereby granted and not patented shall revert to the state of Iowa for the purpose of securing the completion of the said roads within such time, not to exceed five years, and upon such terms as the state shall determine; and provided further, that said lands shall not in any manner be disposed of or incumbered except as the same are patented under the provisions of this act; and should the state fail to complete said roads within five years after the ten years aforesaid, then the said lands undisposed of as aforesaid shall revert to the United States.

“SEC. 5. *And be it further enacted*, That as soon as the governor of said state of Iowa shall file or caused to be filed with the secretary of the interior maps designating the routes of said roads, then it shall be the duty of the secretary of the interior to withdraw from market the lands embraced within the provisions of this act.

“SEC. 6. *And be it further enacted*, That the United States mail shall be transported on said roads and branch, under direction of the postoffice department, at such price as congress may by law provide; provided, that until such price is fixed by law the postmaster general shall have power to fix the rate of compensation.”

The McGregor road, on the ninth of August, 1864, located its line from McGregor to section 19, township 95, range 40, in O'Brien county, to intersect with a proposed road from Sioux City to the Minnesota state line, and on the thirtieth day of the same month filed its map showing said location in the general land office; and in September following the lands within twenty miles were withdrawn from market. The line of 1864 is indicated on the map by the south blue line.

On the thirteenth of November, 1865, William M. Stone, then governor of Iowa, certified to the secretary of the

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interior the completion by the McGregor Western Company of forty miles of the McGregor road, from McGregor to Calmar. No lands were patented to the McGregor Western.

In January, 1866, the Sioux City & St. Paul Railroad Company was organized, and on the seventeenth day of July, 1867, that company filed its map of location in the general land office, from Sioux City to the Minnesota state line, and all lands within twenty miles of this line were withdrawn from market.

The line of this road as located and constructed, as it appears by the map, barely touches O'Brien county at the northwest corner, thus compelling the intersection at a point near said northwest corner. March 31, 1868, the state of Iowa resumed the grant to the McGregor Western Railway Company, and conferred it upon the McGregor & Sioux City Railway Company, now the McGregor & Missouri River Railway Company.

On the fifteenth day of March, 1876, the legislature of Iowa resumed the grant to the McGregor & Sioux City Company of 1868, and reconferred it on said company with new conditions. This act provided against disturbing the rights of the McGregor Company, or affecting the pending litigation over the overlapping land. This grant was never accepted.

On the twenty-seventh day of February, 1878, the legislature of the state of Iowa resumed all grants to the McGregor & Sioux City Company, and regranted to the complainant company "all lands and rights to lands, whether in severalty, jointly or in common, and including all lands, or rights to lands, or any interest therein, or claims thereto, whether certified or not, embraced within the overlapping or conflicting limits of the two grants, or roads made and described by the act of congress," and on the thirtieth of November, 1878, the governor of Iowa certified to the secretary of the interior the completion, by the complainant, of the road from Algona to Sheldon, the point of intersection in O'Brien

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county, in accordance with the granting acts, state and national. This made a complete line of constructed road between the *termini* fixed in the granting act.

In May, 1868, the commissioner of the general land office, by letter to the governor of Iowa, required that the McGregor road should file a map showing the true line of the location through Clay and O'Brien counties to the "true point of intersection." This was in consequence of the fact that the line of the rival road was so located as barely to touch O'Brien county near the northwest corner.

The line of the McGregor road was accordingly relocated from the east line of Clay county, as shown by the map herewith filed, to the point of intersection at Sheldon, and maps of the same were certified and approved by the governor of Iowa and filed in the general land office of the United States.

In March, 1869, Russell Sage, president of the McGregor & Sioux City road, wrote to the secretary of the interior requesting permission to change the location of the line from range 27 (Algona, Kossuth county) westerly, but the secretary refused permission to do so, and replied that "after a road had been definitely located, the map thereof filed and accepted, and the lands withdrawn, no specific authority is given whereby the department can accept another location.

The secretary of the interior approved list No. 1 of lands for the McGregor Company, for one hundred and thirty-three thousand four hundred and fifty-nine acres, on account of road constructed to Mason City. A portion of these lands were situated as far west as thirty-three degrees.

The governor of Iowa, on the eleventh day of February, 1873, certified that the Sioux City & St. Paul Company had constructed its road, commencing at the south line of the state of Minnesota, and ending at Le Mars, a distance of fifty-six and one-fourth miles, and the secretary of the interior patented the overlapping or conflicting lands to the state for the benefit of the defendant company.

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In December, 1877, the governor and register of the state land office, in pursuance of an act of the legislature requiring the same to be done, certified to the Sioux City & St. Paul Company the overlapping lands, the same now in controversy, "subject, however, to conflicting claims."

John W. Cary, General Solicitor Milwaukee & St. Paul Railroad Company, for complainant, with *Thomas Updegraff* and *Melbert R. Cary*, of counsel.

E. C. Palmer and *J. H. Swan*, for respondents.

LOVE, *District Judge*.—The grant in question is to the state of Iowa upon certain trusts clearly indicated by the terms of the granting act. If anything in both law and reason is unquestionable, it is that any construction of the grant or administration of the trust which should defeat the manifest purpose of the grantor ought, if possible, to be avoided. What was the purpose of congress in making the grant? Was it to secure the construction of one of the roads provided for, or both of them? It was manifestly the purpose of the grant to secure the building of both roads. The construction of one of these roads, and especially the shorter and less important of the two, would clearly have fallen far short of the end contemplated by congress. The grant was not a pure donation. Congress was induced to make it by certain considerations of benefit to the public and to the remaining lands. It is evident that congress gave the lands in aid of a project to connect the Mississippi river at McGregor with the Missouri at Sioux City by means of these two roads,—one some two hundred and fifty miles in length, running from the east to the west; the other only about sixty miles long, running in a different direction. There was to be a junction of these roads in O'Brien county. Without this intersection there would have been a failure to connect the two rivers, which was, beyond question, one of the principal objects of the enter-

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prise. If no road had been completed but the short line from the state line to Sioux City, all the chief purposes of the grantor would have been to a very great extent defeated. These purposes were: *first*, the general benefit to the state and people which would result from a through line between the rivers; *second*, the sale of the government reserved lands at the double minimum price on both lines through a country without timber or fuel to aid settlement; *third*, the use of the roads by the United States, expressly reserved in the third and sixth sections of the act, for the transportation of troops, property, and the public mails.

It is manifest that the non-completion of the greatly more important line of road would have resulted in defeating the main purposes of congress, and in a loss to the United States of certain considerations of great value and importance which appear upon the face of the grant. What, then, is the fair inference as to the intent of congress respecting the lands within the overlapping limits at the junction of the roads? Could it have been the purpose of the grantor that the trustee should so administer the grant as to give the whole of the lands at that point, lying as they did within the limits as to both roads, to the short and comparatively unimportant line of road? Of what avail would it have been as to the great purposes of congress, and with respect to the considerations stipulated for by the United States, if by the aid of the lands granted the short line from the state line to Sioux City had been completed, and the main line left incomplete at a point eighty or ninety miles east of the point of intersection? Most certainly we can arrive at no conclusion other than that it was the intention of congress to divide the lands at the point of intersection between the two enterprises. What possible reason can there be, in the absence of express words, to impute to congress an intention to give all the lands at the point of junction to one or the other of the two enterprises? Such a disposition of the lands would, in our judgment, do violence

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to the intent of the grantor, which, if possible, ought to prevail.

As a matter of course, the intent of congress to give the lands to one or both roads was dependent upon the performance of the conditions of the grant; in other words, upon the construction of the roads according to the terms of the act and the legislative will of the trustee. To illustrate this view, suppose congress should in the same act make a grant to two parallel roads running so near to each other as to give rise to overlapping limits, would it not be the manifest intention of the grantor, in the absence of words to the contrary, that the lands should be divided between the two enterprises? The purpose of such a grant would be to secure the building of two roads, but by giving all the lands to one road the building of the other would be defeated, and thus the purpose of the grantor would be thwarted.

But the United States is not the only party to the grant. There are other parties beneficially interested in it. The consideration for the grant is to be performed by the railway companies contracting with the trustee to do the work, and the question arises, when is their right to the land complete? Their right is certainly not made complete by the mere establishment of the definite line of their road. Neither is their title to their line consummated by a grant to them by the trustee; or, in other words, by an act of the state legislature giving them the lands. The grant being to the state *in præsenti*, the establishment of a definite line gives it certainty and fixed limits. The grant then ceases to be afloat. The legal title to the lands in place passes to the state by virtue of the fixed line. The limits of the indemnity lands are also thus fixed, and the title passes to the trustee to certain and specific tracts of land so soon as the lands are selected. But when is the right of the beneficiary, the railway company, to the lands complete? Never, certainly, until the company has performed its contract with the trustee by the construction of the work according to the law of

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the state granting the lands for that purpose. This law becomes the contract between the railway company and the trustee, and any rights which the company may have in advance of performance on its part are merely inchoate. But when the railway company has built the road in compliance with the will of the legislature, and in accordance with the act of congress granting the lands, its right to the lands, in law and equity, is complete. It has then performed the consideration upon which it is entitled to the land, and it would be a positive wrong to the company so performing to deprive it of the consideration flowing to it under the contract.

Now, it so happens in the case before us that both the complainant and defendant companies have performed their respective contracts with the state of Iowa. They have both built their roads in accordance with the legislation of the state and of congress. The complainant company has constructed its road to the acceptance of the state to the point of intersection in O'Brien county, as required by the act of congress. The complainant company now claims one-half of the lands lying within the overlapping limits. The defendant company resists this claim, and seeks to exclude the complainant entirely from the lands within the same limits. The whole of these disputed lands lie within the limits fixed by the act of congress to the lands in place and the indemnity lands coterminous to both roads.

This brings us to the consideration of the grounds of law and equity upon which the defendant company claims the whole of the disputed lands to the entire exclusion of the complainant company. It is not our purpose in this opinion to review all the various propositions urged by the respondents in support of their position. This, within any reasonable limits, would be impracticable. We will, therefore, confine our attention to the consideration of the defendant's positions, which we regard as those upon which they must stand if the ground they occupy can be maintained at all.

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In so doing we shall not follow exactly the order pursued by the respondent's counsel.

The respondent contends that the Sioux City & St. Paul road was prior to its rival in location and construction, and that "priority of location of route, of construction of road, and of selection of lands on the line of location give prior, paramount, and exclusive title to the lands thus selected." This proposition is untenable. It is impossible to conceive that congress could have intended that the whole of the lands within the overlapping limits should go to one or the other of the enterprises in question. The only rational inference is that congress intended that both roads should participate in these lands. Now, by applying the principle that priority of location and construction gives priority of right, it would have been inevitable that the intention of congress would have been utterly defeated. Both roads could hardly, in the nature of things, be located and constructed at the same precise time. It was inevitable that one should be located and constructed sooner or later than the other. The McGregor enterprise had more than two hundred and fifty miles to locate and construct; the Sioux City & St. Paul about sixty miles. A race of diligence between them would have been no race at all. If congress had intended that the principle of priority should be applied, it might just as well have given the lands at the place of intersection outright to the Sioux City & St. Paul enterprise. Nothing but an utter want of all diligence on the part of the last-named enterprise could have given the McGregor Company any chance whatever to secure a single acre in the overlapping limits.

Take the case for illustration of a grant in the same act to two parallel roads with overlapping limits. In such a case, if one road, by superior diligence in location or construction, or both, could secure all the lands, the building of the other road would be prevented and the will of the

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grantor defeated; for it must be assumed that in such a case the purpose of the grantor would be to secure the building of both roads, and not one or the other of the two. Hence we are clear that the principle of priority contended for cannot be adopted to solve the difficulty of overlapping grants, and in this we are sustained by authority. See Mr. Justice Miller's opinion on page 24 of complainant's brief; Mr. Justice Harlan's, on page 25 of same; also, Judge Dillon, in 4 Dill. 307.

Again, the defendant's counsel contend that the rights of the complainant company *were* immutably fixed by the line which the McGregor Company caused to be located and returned to the proper department of the government in August, 1864; that by virtue of this line the limits of the grant under which the complainant claims were established; that thereupon the lands in place on that line passed to the trustee from the United States, and the grant ceased to be afloat; and that no power in the government, except congress, could change that line so as to authorize the complainant company to go beyond its prescribed limits on either side for lands in place, or for indemnity lands. If this view can be sustained, it seems to be conceded that no considerable part of the lands in dispute can be awarded to the complainant. Doubtless in ordinary cases of land grants for railroads, the principle for which the defendant contends prevails. When the line of the road is definitely located and assented to by the proper department, the limits of the grant are fixed; titles to specific lands accrue to the state in trust for the enterprise, and to purchasers from the United States, within the defined limits of the grants; and any subsequent change of the line and the consequent limits of the grant would lead to great confusion of rights and titles.

But we are of opinion that the grant now before us is peculiar, and that the rule claimed by the defendant cannot be strictly applied to it. Here was a grant in the same act for two railroads which were to intersect each other in O'Brien

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county. There was no authority in the law to make the intersection beyond the limits of O'Brien county, and if the law had been in this regard violated, we can see no ground upon which the McGregor Company or its successors could have claimed the land. Now, until the line of the Sioux City & St. Paul road was located it was simply impossible to fix definitely the line of the other road through O'Brien county to the point of junction, so as to conform to the requirements of the act of congress. Hence the line of 1864 within O'Brien county was necessarily an open and indefinite one until that of the rival company was established, about two years later. If at any time before the location of the defendant's line in O'Brien county the line of 1864 had been projected westward, the point of intersection would have been beyond the limits of O'Brien county. We judge both from the nature of the case and the history of the transaction that both the federal and state governments must have regarded the line of 1864 within the limits of O'Brien county as open and indefinite until the line of the other road was located. It matters not, in our opinion, that the line of 1864 may have been accepted and acted upon by both governments as to public lands lying upon it east of Clay county. Such a recognition of it is not, as far as we can see, at all inconsistent with a contemplated change of the line in Clay and O'Brien counties, so as to make it conform to the requirements of the act of congress with respect to the point of intersection.

The line of 1864 was projected upon paper very soon after the passage of the act, by the sole authority of the McGregor Company, for the apparent purpose of causing the lands to be withdrawn from market. This line was not surveyed, staked out and platted according to the requirements of the regulations. No monuments were placed to designate it upon the face of the earth. Some two years later the line of the Sioux City & St. Paul Company was located, and instead of its running through O'Brien county, as there was reason to suppose it would, its projectors located it so as barely to

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touch that county very near its northwest corner, as seen on the map herewith filed. It then became necessary to change the line of 1864 so as to make the intersection. Suffice it to say that the change which was in fact made was with the assent of the land department at Washington, and in order to comply with the requirements of the act of congress. Defendant's counsel contend that this change of line was not made by the order of the government at Washington. This is immaterial. It is a contention more about words than anything else. It is beyond question that the commissioner of the general land office assented to the change; and, indeed, the inference seems irresistible that he required it to be made. It is not material that there was no formal order for the change. Thus, Mr. Wilson, the commissioner, in his letter to the governor of Iowa, bearing date May 13, 1868, says that "in view of adjusting the grant respectively it is desirable to have the true point of intersection in O'Brien county in accordance with the statute;" and he requests that at an early day a map properly authenticated, showing the true location of the line through Clay and O'Brien counties to the point of intersection with the Sioux City & St. Paul Railroad, be filed, etc.

This clearly shows—*first*, that the grant in Clay and O'Brien counties had not then been adjusted upon the old line of 1864. If the commissioner considered the last-named line as definitely located, why could not the grant be adjusted in Clay county and in O'Brien to the old terminus without a map showing the "true" location of the line through Clay and O'Brien to the "point of intersection?" It is evident that in the view of the commissioner the old line through Clay and O'Brien was not the "true line," and that the true line could not be located without reference to the point of intersection.

Again, the commissioner, in a letter of October, 1868, to D. C. Sheppard, civil engineer, having in charge the duty of relocating the line through Clay and O'Brien to the point of junction, says to him that "by the act of congress of May

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12, 1864, it is required that a map be duly filed in the department, properly authenticated, showing the located line of road through Clay and O'Brien counties to the point of intersection with the Sioux City & St. Paul road;" and in this letter the commissioner, in order to enable Mr. Sheppard to make the survey and proper returns, enclosed to him a diagram showing the located line of the McGregor Western road to the eastern boundary of Clay county, and of the proposed line of said road through Clay and O'Brien to the point of intersection in the latter county; also forms of authentication to be attached to the maps which Mr. Sheppard was to make and return. Now, all this is entirely inconsistent with the defendant's view that the line had been definitely located through Clay county and a part of O'Brien county ever since 1864.

But what follows is still more explicit. In a letter of November 3, 1868, the commissioner again writes to Mr. Sheppard:

"I am in receipt of your letter of the twenty-seventh ultimo, asking further instructions as to the point of intersection of the McGregor, etc., with the Sioux City, etc., road. In answer, I have to state that the act of May 12, 1864, expressly states that the McGregor Western Railroad 'shall intersect the road running from Sioux City to the Minnesota state line, in the county of O'Brien,' which, according to the located line of the last-named road, the point of intersection will be at the northwest corner of O'Brien county. In regard to your proposition to delay the survey of the line till spring, I have to request and insist that the work be commenced immediately, in order that this office may determine by sectionized limits the lands to be held at \$2.50 per acre within ten miles each side of the located line running through Clay and O'Brien to the point of intersection."

Here again is clear proof that the line of 1864, through Clay and O'Brien counties, was not regarded and treated by the government as definitely settled, and as fixing the limits of the grant to the McGregor enterprise; and if, as defend-

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ant's counsel contend, the commissioner's action in the matter did not amount to a positive order for a relocation of the line from the eastern boundary of Clay county to the point of junction, it was such a requirement as could not be ignored or disregarded by the McGregor Company. Nor is this action of the commissioner at all inconsistent with his refusal to accede to Mr. Russell Sage's request. Mr. Sage asked permission to relocate the line from a point (Algona) about forty miles east of the east line of Clay county. It is evident that the commissioner considered the line fixed and established from that point to Clay county; and it had, doubtless, been acted upon in the department. The commissioner declared that he had no authority to assent to a relocation of the line from that point, because it had been definitely located, the map thereof filed and accepted, and the lands withdrawn. But the commissioner might well assume that he had authority by virtue of the act of congress requiring the intersection in O'Brien county to require such a relocation of the line as to make it conform to the terms of the act; and at what point on the old line the deflection northward, to accomplish that purpose, should commence, must, of course, have depended upon circumstances. The commissioner might well have considered himself authorized to indicate the point in question. It was imperatively necessary that some one should fix the point of departure from the old line, and we see no reason why the commissioner was not that person. At all events, it is beyond question that he did require the relocation through Clay and O'Brien counties, and that he suspended the adjustment of the land grant until the relocation was effected.

The relocation was made in compliance with the act of congress. Who is now objecting to the changed line? Not the United States or any purchaser of alternate sections from the United States. The secretary of the interior, Mr. Schurz, clearly in his decision of April 8, 1880, recognized the changed line through Clay and O'Brien counties to the point of junc-

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tion. The only party complaining of the change as unauthorized and nugatory is the defendant company, and yet the change was made necessary by the action of that company in locating its line. First, there was long delay in making the location, and in the second place the line was so located as barely to touch O'Brien county, rendering it impracticable to comply with the act of congress without abandoning the old line of 1864. We think it would be unjust and inequitable to allow the defendant company to exclude the complainant from a participation in the disputed lands upon grounds that arose from the delay of location under its enterprise, and the final location of its line at the extreme northwest corner of O'Brien county.

The respondent's eighth proposition is that "the lands in controversy were earned by the defendant company under the provisions of the act of congress of May 12, 1864, as early as 1871," and that "these lands had not only been earned by the construction of the road directly through them, but they had been patented to the state for the benefit of the defendant company, and they had been mostly conveyed by the state to the company in obedience to legislative command.

It is further said that "all the lands claimed, with the exception of here and there a small tract, had been patented to the state for the benefit of the defendant company long prior to the passage of the act upon which the complainant rests its claim of title.

The facts upon which this proposition rests seem to be briefly as follows:

"On the twelfth day of February, 1873, Mr. Secretary Delano addressed the following letter to Hon. Willis Drummond, then commissioner of the general land office:

“ DEPARTMENT OF THE INTERIOR,

“ WASHINGTON, D. C., February 11, 1873.

“ SIR: I have examined the case of the *McGregor & Missouri River R. Co. v. The Sioux City & St. Paul R. Co.*, on appeal from your decision, and I find that the Sioux City

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& St. Paul Company first located and constructed its line along the lands in controversy and is entitled to the same.

“ ‘I reverse your decision, and herewith return the papers transmitted by you.

“ ‘Very respectfully, C. DELANO, *Secretary.*

“ ‘Hon. WILLIS DRUMMOND, *Commissioner General Land Office.*’

“In pursuance of this decision the lands in controversy were patented to the state of Iowa for the use and benefit of the Sioux City & St. Paul Railway Company.

“Afterwards, to wit, on the thirteenth day of March, 1874, the legislature of the state of Iowa passed an act providing that the governor of the state should certify to the Sioux City & St. Paul Railroad Company all lands which were then held by the state of Iowa in trust for the benefit of said railroad company, in accordance with the provisions of section 2, chapter 144, of the laws of the eleventh general assembly. Turning to said section 2, chapter 144, we find the following:

“ ‘Sec. 2. Whenever any lands shall be patented to the state of Iowa in accordance with the provisions of said act of congress, said lands shall be held by the state in trust for the benefit of the railroad company entitled to the same, by virtue of said act of congress, and to be deeded to said railroad company as shall be ordered by the legislature of the state of Iowa at its next regular session or at any session thereafter.’

“In pursuance of this legislation the governor of the state did certify the lands in controversy to the Sioux City & St. Paul Company, subject, however, to ‘conflicting claims.’ It is claimed that this qualified clause, saving all ‘conflicting claims,’ is nugatory, since the governor had no authority to impose it. Such, however, seems not to have been the view taken of the governor’s action by the general assembly of the state of Iowa, since we find that in the act of 1878, trans-

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ferring to the complainant company the lands and rights belonging to the McGregor enterprise, the following provisions occur:

“ ‘Sec. 2. That all lands and rights to lands, whether in severalty, joint tenancy, or in common, and including all lands or rights to lands, or any interest therein, or claims thereto, whether certified or not, embraced within the overlapping or conflicting limits of the two grants made and described by the act of congress hereinafter designated, etc., be and the same are hereby granted, etc., to the Chicago, Milwaukee & St. Paul Railroad Company.’ ”

“ Again, in section 3:

“ ‘When said railroad shall have been built and constructed to the point of intersection with the Sioux City & St. Paul Railroad, etc., the governor shall patent, etc., to said Chicago, Milwaukee & St. Paul Railway Company all the remaining lands belonging to and embraced in said grant appertaining to their line of railroad, including all or any part or moiety of the lands in said overlapping limits which by the terms of the act of congress appertain to their line of road.’ ”

We regard the eighth proposition now under consideration as the strongest and most cogent relied upon by the respondent's counsel, and it brings back our minds to the true and decisive question of the case, namely, what is in this respect the true construction of the act of congress granting the lands? Was it the intention of the grantor that the lands in dispute should be applied to the building of two roads instead of one, and held in common by the companies fulfilling the conditions of the grant? Or is it the true construction of the grant, that one of the companies might, by priority of location and construction, entitle itself to the whole of the lands within the overlapping limits to the entire exclusion of the other? If this is the true construction, it was competent for the executive department of the federal

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government and the trustee to patent the lands for the use and benefit of the defendant corporation to the exclusion of the complainant.

But if, as we hold, it was the purpose of congress and is the true construction of the act that the lands should be applied to the building of both roads; that no one company could by mere priority entitle itself to any exclusive right; that, on the contrary, the other company, by actually building its line to the point of junction, in accordance with the terms of the grant and the legislative will of the trustee, would entitle itself to equal participation in the lands,—then it was not competent for the executive department or the trustee to give the lands exclusively to the defendant company. If our construction of the grant be correct, the defendant company, by building their line of road, could “earn,” so to speak, no more land than the law gave them—that is, one undivided half of them; and if, by the action of the executive department and the trustee, they obtained the legal title to the whole of the lands, they must hold them subject to the trusts created by the grant in favor of the other company. This trust equity will enforce according to its own well-known remedial processes.

Mr. Secretary Delano's decision, which seems to be the source of the defendant's claim of exclusive right, proceeded upon the sole ground of priority of location and construction. This was manifestly erroneous in point of law, and it cannot be admitted to exclude the complainant company from its equal right to lands earned by it in compliance with the *conditions imposed by the* legislative will of the trustee and act of congress.

It is not, we think, in the power of the secretary of the interior, by an erroneous interpretation of the law, to confer upon one party lands which, by the true construction of the statute under which he acts, belong to another and different party.

Counsel for the respondents take a distinction between the

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lands in place and the indemnity lands under the grant of 1864. They contend that the law makes it the duty of the secretary of the interior to cause the indemnity lands to be selected, and that his action in that behalf is conclusive, and cannot be reviewed; and since the indemnity lands within the overlapping limits under this grant were selected upon the defendant company's line, and for the defendant company exclusively, there is no power anywhere to review the action of the secretary, and change or reverse the same.

This argument, we think, simply confounds the legal and equitable title to the lands. The selection of the lands in the indemnity limits may be conclusive so far as it operates to fix the legal title in the state as trustee, but we are quite clear that he had no power, in a case like this, to decide the question as to what company or companies should be entitled to the beneficial interest in the lands. The ultimate decision of such a question was necessarily a matter of judicial cognizance. It depended upon conditions of which the secretary could have had no legally competent means of information. The lands in place and the indemnity lands were granted by congress for precisely the same purposes. The intention of the grantor with respect to them was exactly the same. Both were subject to the same trusts. The mode of making the title of the trustee specific was different, but when that title became certain in the trustee by the location of a definite line in one case, and by selection in the other, it was the duty of the trustee to apply the two kinds of land to precisely the same trusts. It was not competent for the secretary of the interior to dispose of the selected lands to any trust or purpose not warranted by the true construction, meaning and purpose of the granting act. He could not give these lands wholly to one road or one company, if the true construction of the grant requires that they should go to two roads and two companies.

If by the true construction of the grant the McGregor enterprise was entitled to one-half the lands in controversy, and

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if the company representing that enterprise has "earned" that half by the construction of the road, it was not in the power of the secretary to deprive them of their beneficial interest contrary to law. He might, indeed, cause a patent to issue investing the respondent company with the legal title; but a court of equity will nevertheless enforce the trust according to the true intent and meaning of the act of congress, which is the paramount law of the trust.

It may be granted that in the matter of selecting the indemnity lands the action of the secretary of the interior is conclusive, but it by no means follows that his designation of the party entitled to the beneficial interest in the lands is conclusive.

It was said in argument by respondent's counsel that the respondent company had paid out considerable sums for land office fees and perhaps other expenses in perfecting the title to the lands in question. The question as to sums so expended we leave open to future discussion, with the suggestion that if the defendant is entitled to be paid any part of such expenses, we see no reason why the pleadings may not be amended so as to bring that matter before the court, and the decree so framed as to adjust the same according to equity.

We have said in the foregoing opinion that the complainant claims not the whole, but one undivided moiety of the disputed lands. The bill may be framed upon a different theory, but the general solicitor of the complainant corporation, in his closing argument, distinctly stated that the complainant claims title to only a moiety of the lands in common with the defendant company.

McCRAEY, *Circuit Judge*, concurs.

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KEEP v. INDIANAPOLIS & ST. LOUIS R. CO.

KEEP v. UNION RAILWAY & TRANSIT CO.

(Eastern District of Missouri. February, 1882.)

1. TRIAL OF CAUSES OF A LIKE NATURE AT THE SAME TIME — R. S. § 921.— Federal courts have authority to order causes pending before them of a like nature, and in which substantially the same questions are involved, though against different defendants, to be tried at the same time, even where, in consequence, the defendants will be brought into antagonism.
2. SAME — JUDGMENTS.— Where causes, one of which sounds in tort and the other in contract, are tried at the same time, separate judgments may be rendered in each.
3. PRACTICE — JOINT WRONGS — SEPARATE SUITS.— Where several tortfeasors are each and all liable for the same wrongful act, a separate suit for damages may be maintained against each of them.
4. COMMON CARRIER — NEGLIGENCE — MOTIVE POWER.— A common carrier is liable to a passenger whom it has contracted to convey to a particular point, if he is injured while being so conveyed through the negligence or unskillfulness of employees of a corporation with which such carrier has contracted for motive power.
5. LIABILITY OF PARTY FURNISHING MOTIVE POWER — NEGLIGENCE — UNSKILLFULNESS.— In such cases the corporation furnishing the motive power is also liable to the passenger if the injury is sustained through the direct negligence or unskillfulness of its employees.

Motion for a new trial.

Separate judgments having been rendered against each of them, both of the defendants in the above-entitled causes move for a new trial. The motion of the Union Railway & Transit Company assigned as error: (1) That the verdict is unsupported by the evidence, but is contrary thereto, and is against the evidence and weight of evidence. (2) That the verdict is for the plaintiff, whereas it ought to have been for the defendant. (3) That the court erred in refusing to give the instructions asked by defendant at the close of plaintiff's case. (4) That the court erred in refusing to give the instructions asked by defendant at the close of the evidence in the case. (5) That the court erred in giving the instructions

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which were given by the court to the jury. (6) That the court erred in its instructions given to the jury. (7) That the court erred in its instructions given to the jury after they retired, and in answer to their inquiry to the effect that "if each company is at fault the same amount of damages should be rendered against each." (8) That the court erred in admitting improper and illegal evidence against the objection of the defendant; the court erred in rejecting legal, competent and material evidence offered by the defendant. (9) That the court erred in consolidating the above-named case of *Henry V. Keep v. Union Railway & Transit Co. of St. Louis* with the case of *Keep v. Indianapolis & St. Louis R. Co.*, and in trying the same together. (10) That the verdict after consolidation should have been a joint verdict, and the judgment joint. (11) That the damages are excessive.

The motion of the Indianapolis & St. Louis Railroad Company sets forth substantially the same assignments of error as that of the Union Railway & Transit Company, with the exception of the third, fourth, ninth and tenth assignments, which are omitted.

For a report of the trial of said cases, see 9 Fed. Rep. 625 *et seq.*

L. B. Valliant and Joseph Dickson, for plaintiff.

John T. Dye, for Indianapolis & St. Louis Railroad Company.

S. M. Breckenridge, for Union Railway & Transit Company.

TREAT, *District Judge*.—At the calling of these cases they were consolidated for purposes of trial—that is, the court ordered that they should be tried at the same time, before the same jury; yet each case to be treated as distinct, and requiring a separate verdict. Such has been the uniform

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practice of this court for a quarter of a century, commencing with the administration of Justice Catron, of the supreme court (Wells and Treat associated), to the present time. Such practice was based on the act of July 22, 1813 (now section 921, R. S.), which is as follows:

“When causes of a like nature or relative to the same question are pending before a court of the United States or of any territory, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.”

It often happened, under the land litigations prevalent here from twenty-five to thirty years ago, that from fifty to one hundred cases in ejectment would be brought by one plaintiff against different tenants in possession, the main subject in controversy being the plaintiff's title. Instead of trying each of said cases separately, involving one or two weeks' time each, and resting on the same evidence as to title, the court could order all to be tried at once, so that the court could determine whether the plaintiff had a right of recovery as against the defendants who claimed under a common title adversely.

If the plaintiff recovered, a separate verdict was rendered against each of the defendants as to damages, and the particular premises occupied by him; and if the plaintiff failed, a separate verdict was rendered in favor of each defendant, with costs. Like practice has prevailed here in all cases within the provision of the act of 1813 whenever the court's attention was directed to the subject.

The cases under consideration fall clearly within the practice thus long established; and this is the first time in twenty-five years that it has been disputed. It must be said, however, that there may be a difference between the consolidation of cases to be tried as one case, and the trial of separate cases

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before the same jury at the same time. Many of the authorities and text-writers cited do not note the distinction, and few make any reference to the act of 1813.

From facts and circumstances brought to the attention of the court, it was obvious that the same question was involved in each of these two cases, viz.: whether the plaintiff sustained damages through the negligence of one or the other of the defendants, and if so, whether one or both were responsible therefor. If the cases were tried, one after the other, the same evidence would have to be presented, to the unnecessary delay of business. No exception was taken to the order of the court, and, if it had been, it would have been promptly overruled. This reason and justice of the act of 1813 must be apparent to all who desire the prompt determination of litigated cases, without useless costs and expense.

It is contended that by this practice the two defendants were brought into an antagonism with each other, as well as with the plaintiff, whereby an unnecessary burden, attended with some confusion, was thrown on the transit company. But so, in like cases, it always became the duty of the court to discriminate, as it did in these cases, between the respective duties and liabilities of the defendants.

The cases were peculiar in several respects. The wrong done occurred under such circumstances as at first blush to make it a question between the defendants *inter sese* as to which was in fault. To the plaintiff, who could have but one satisfaction, it was immaterial whether one only or both defendants were responsible to him. As to the liabilities of the defendants *inter sese* he had no concern. He had a right of recovery against both (as held), and if either paid therefor it could adjust with the other any controversy which might arise between them.

The principal facts were that plaintiff purchased a through (coupon) ticket from New York to the city of St. Louis; the last coupon being over the Indianapolis & St. Louis Railroad Company from Indianapolis to St. Louis. That coupon did

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not authorize the contracting party or parties to leave the plaintiff in East St. Louis, to find his way over the bridge and through the tunnel to the St. Louis depot as best he might. Some one was responsible for his safe transfer to and delivery at the St. Louis depot, involving the bridge and tunnel transfer.

It is contended earnestly that the Indianapolis & St. Louis Railroad Company was an intermediate road between New York and St. Louis, whose terminus was at East St. Louis, and although its conductor took up the terminal coupon, and gave a bridge and terminal ticket, that in doing so it acted only as the agent of the transit company, its own responsibility terminating at its station in East St. Louis; that from that point the transit company became the connecting and terminal road. To this there are two objections: *first*, the terminal coupon was from Indianapolis to St. Louis, over the Indianapolis & St. Louis Railroad; and *second*, that the accident happened before that railroad company actually reached its station or depot at East St. Louis, where it would have delivered its passengers if bound to the latter place. Besides, it had its arrangements with the other defendant for hauling its cars over the bridge and through the tunnel; the latter furnishing merely the motive power. The trains were not taken up at East St. Louis; there was no transfer of passengers there; the train was a through one. Each through passenger retaining his seat was to be landed at the St. Louis depot, through the operation or agency of the contracting party or parties.

Whose duty was it on the arrival of the train at East St. Louis to forward the same? Had the obligations of the Indianapolis & St. Louis Railroad, under the circumstances, then ceased, and all the common carrier's obligations thereafter been devolved on the transit company? In that connection the court received written evidence as to the corporate character of the transit company, and its contracts with the defendant railroad. It ruled, as a matter of law, that

for all the purposes of these suits the transit company was the agent of the railroad, bound to haul the latter's trains, merely furnishing the motive force and managing the same. Hence the railroad was a common carrier, responsible for the acts of its agent.

It may be that under other facts and circumstances, and possibly under later arrangements, a different relationship legally may exist between those companies; but the court, in trying these cases, could not go beyond the record before it.

The facts were, that on the arrival of the railroad train in East St. Louis, and before the same had reached the Relay depot, its locomotive was detached for the purpose of having the transit company's engine attached. The passengers were still in the cars. The transit company's engine, in attempting to attach to the train, did so with such negligence as to cause the injury complained of. The train itself should have advanced to or nearer the Relay depot before the locomotive was detached; and, on the other hand, the transit engine, in connecting, should have done so without thrusting the train across the track of another moving train. Hence, as stated in the charge of the court, the railroad company was bound to deliver the plaintiff safely, under the obligations of a common carrier, in St. Louis, and was responsible for whatever injuries were caused by the negligence of its agents. As to the transit company, though under its contracts with the defendant it was its agent, yet if in the course of its employment it injured, through its direct negligence, a third party, with whom it had no privity of contract, still it was answerable to him for the wrong so done. Questions as to pleadings are raised, drawing formal distinctions between contracts *ex contractu* and *ex delicto*, which are irrespective of the merits of the case, and which, if well taken, would have resulted at the trial in formal amendments, if required.

The question involved may be of large significance. The many railroad trains arriving at and departing from the St. Louis depot use, under contract with the transit company,

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the motive power of the latter. To whom is the passenger to be remitted for injury suffered? He departs and arrives by his contract, not at East St. Louis, but at St. Louis, on the west side of the river. The intermediate agency by which he is transferred to and from the St. Louis depot, so far as his contract is concerned, is not a separate contract, remitting him for redress when an injury has been sustained solely to such intermediate agency; but, as in these cases, he may, under acts of negligence, have his remedy against either or both.

The questions, sharply defined, are whether the obligations of the Indianapolis & St. Louis Railroad ceased, under the circumstances stated, when its locomotive was detached from its train at East St. Louis; and, on the other hand, whether what occurred subsequently involved a liability solely against the transit company.

As has been stated, a mixed question of fact might have been presented if the duties of the Indianapolis & St. Louis Railroad had terminated when it left its cars on the track in East St. Louis, short of the Relay depot, and if its obligations ceased only when the cars reached the Relay depot, and if in that intermediate stage of transfer the transit company undertook to haul the train, not to the Relay depot but to the St. Louis depot. The court thought it unnecessary to confuse the jury with such questions, but, having the charter and contracts of the transit company before it, decided, as a matter of law, that the Indianapolis & St. Louis Railroad was bound to deliver plaintiff in St. Louis; that its obligations could not be discharged by any arrangement made by it with the transit company. It is thus that the main propositions arise. If the transit company was a common carrier, and the obligations of the Indianapolis & St. Louis Railroad Company terminated on surrendering the cars of its train to the former, as the terminal company, then the latter was not responsible. But it had not reached its depot in East St. Louis, and, whatever may have been its

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understanding with the transit company, the facts showed that the injury to plaintiff occurred during the process of discharging one motive force and attaching another. The various authorities cited as to consolidation of causes, it is held, do not change the rule. It is true that when several causes of like nature are brought against the same defendant he may move to have them consolidated; but it does not follow that causes of like nature against different defendants may not be heard at the same time, each case being heard and determined as a distinct case, as was done in this instance. Several text-writers and some adjudicated cases have been cited on the question of consolidation, which it is not deemed necessary to review, for most of them refer to state statutes considered inapplicable; and the two cases in United States courts are not in conflict with the views heretofore expressed.

In 1 Blatchf. 151, a motion was made to have a demurrer in one of eleven cases control the others, and the court denied the motion. Ample grounds therefor may have existed; just as in several cases between the same plaintiff and defendant the court will, in its discretion, not compel the decision in one to determine the others, unless the rights of all can be properly heard and settled in one of the suits — the others to abide the result.

The case of *Holmes v. Sheridan*, 1 Dill. 351, is illustrative, where the court, instead of consolidating the cases as if only one and the same cause of action was presented, ordered the two cases to be tried at the same time, and referred to state statutes for authority.

Sections 977 and 978 of the Revised Statutes indicate that the legislation of congress was directed to the trial of cases at the same time by formal consolidation or otherwise, when the time of the court could be thereby saved, costs and expenses avoided, and the rights of the parties litigant not prejudiced. It may seem somewhat anomalous that each of the defendants is to be held as for the same *tort*; but there

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may be several *tortfeasors*, each and all of whom are liable for the wrong done. The fact that separate suits were brought does not exonerate either from his wrongful act. The plaintiff may have had, as in these cases, a cause of action against each of the defendants, and entitled to judgments accordingly if tried separately; and why not such separate judgments when tried at the same time, though one sounded in *tort* and the other in contract? The distinctions drawn as to the relative duties and obligations of the two defendants are analogous to those imposed on a tow-boat in towing a steamer, as contradistinguished from or associated with the vessel towed. The motions for new trial overruled.

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BOONE and another *v.* IOWA & MINNESOTA CONSTRUCTION CO.
and others.

(*District of Iowa. January, 1882.*)

1. REMOVAL OF CAUSE — INTERVENORS. — Where the intervening petition charges fraud, and is not in the nature of a bill charging errors or irregularities merely, or where it charges want of jurisdiction and want of notice to complainants, and where no attack is made on any final judgment, but only on interlocutory orders still within the control of the state court, intervenors may remove the cause.
2. SAME — LOCAL PREJUDICE. — Where there has been no final trial or hearing, intervenors may remove the cause on the ground of local prejudice, on compliance with the provisions of the act of congress.
3. SAME — HOW EFFECTED. — The filing of the petition in the state court *ipso facto* removes the cause.
4. SAME — RIGHT OF REMOVAL — RECEIVER. — The petition of intervention is in the nature of a suit for relief as against defendants therein named, and the right of removal is not affected by the fact that a receiver had been appointed by the state court to wind up the affairs of the corporation.
5. SAME — RIGHT OF INTERVENORS. — The right of intervenors to a preliminary injunction to restrain further proceedings until there can be a hearing on the merits, follows as a matter of course.

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Motion to remand.

McCRARY, *Circuit Judge*.— That the intervening petition, filed in this case in the state court by George Boone and Francis E. Hinckley, presents a controversy between citizens of Illinois on one side and citizens of Iowa on the other side, is conceded. But it is insisted that the case was, nevertheless, not removable, because the petition of intervention is a supplementary proceeding, so connected with the original proceeding as to form an incident to it, and substantially a continuation of it. To determine whether or not this is so we must look to the record. The proceedings in the state court were instituted in 1875 by a petition presented by L. Schoonover, trustee, alleging that he was a judgment creditor of the said Iowa & Minnesota Construction Company, and stating the names of the stockholders in that corporation, with the sum subscribed by each. He alleged the insolvency of the corporation, and prayed the appointment of a receiver. This application was set down for hearing at the March term, 1875, and notice to the stockholders was ordered to be served by publication in a newspaper, and by sending the same through the mail. At the said March term, notice having been so given, the said L. Schoonover was appointed receiver, and authorized to dispose of the assets, collect the assessments from stockholders, and to pay the debts. There was no appearance for the stockholders. The court from time to time thereafter ordered assessments upon the stock to be made and collected, and the receiver from time to time reported as to his doings, and the proceedings were still pending and undisposed of in the state court, when, on the seventh day of November, 1881, the said Boone and Hinckley appeared for the first time, and filed therein their petition of intervention, by which they allege in substance that they are, and have ever since the commencement of said proceedings, been residents and citi-

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zens of Illinois, and that they have had no notice of said proceedings. They aver that a certain large claim against the corporation, held by one Stacy, for whom the said Schoonover, the receiver, is assignee, is fraudulent; and that the said Schoonover has not defended against it; and that Stacy is in fact largely indebted to the incorporation. Fraud, collusion and conspiracy are charged; and the prayer is that there may be an accounting as between Stacy and the corporation, and that the receiver may be enjoined from proceeding, by suits at law or otherwise, to collect from the intervenors their unpaid stock, and applying the same to the payment of the alleged fraudulent claim of Stacy; also that the order appointing said Schoonover as receiver be set aside. The rule by which we are to be guided in determining whether this is a removable controversy has been settled by repeated adjudications of the supreme court, and is as follows:

This court cannot entertain jurisdiction to set aside the judgment of a state court for mere irregularity, or in a case where the proceeding is merely tantamount to the common-law practice of moving to set aside a judgment for irregularity, or to a writ of error, a bill of review, or an appeal; but it has jurisdiction of a bill to set aside a judgment for fraud, or upon the ground that it was rendered by a court having no jurisdiction. *Gaines v. Fuentes*, 92 U. S. 10; *Barron v. Hunton*, 99 U. S. 80.

That the removal of the case is not prohibited by the doctrine announced in these cases is clear for several reasons: (1) The intervening petition charges fraud, and is, therefore, not in the nature of a bill charging error or irregularities merely. (2) It charges want of jurisdiction, and that the proceedings complained of have been had without notice to complainants. For the purposes of the present motion I suppose this must be taken as true. (3) The intervenors do not attack any final judgment of the state court, but only

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the interlocutory orders made from time to time, and which, at the time of the intervention, were still within the control of the state court.

Another consideration, however, is still more conclusive of the question. The petition for removal is not based entirely upon the citizenship of the parties. It charges local prejudice and prays removal upon that ground also. Now, if we consider the proceeding in the state court from the beginning as one suit, and also assume that the intervenors had notice, and were proper parties, still it is clear that there has never been a final trial or hearing, and that, therefore, the petition for removal, upon the ground of local prejudice, is in time, and perfectly good. It may be that, if these assumptions are found upon investigation to be correct, we may be constrained to hold the intervenors bound by some of the orders of which they complain, unless they can successfully attack them for fraud; but however this may be, the right of removal is clear. We are not called upon, in passing upon that question, to inquire what the ultimate judgment may be upon the issues presented. It is enough that the parties are citizens of different states; that the amount involved exceeds \$500, exclusive of costs; that the proper affidavit of prejudice is filed; and that the cause had not been finally tried or determined when the petition for removal was filed. All these conditions we find fulfilled.

It remains to consider the question whether the intervenors were parties to the suit in the state court at the time they filed their petition and bond for removal. I suppose the theory of the receiver and of such creditors as sustain his action is that the intervenors have been parties from the beginning by virtue of the publication of notice or sending thereof through the mails, or both. If this be so, that is the end of controversy on this point; but the intervenors deny this, and assert that they never were parties until they made themselves such by filing their petition of intervention; and upon this theory the counsel for the receiver insist that they

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had no right to intervene without leave of court, which was not obtained, and that they were, therefore, not parties. The right to intervene, under the code of Iowa, is given absolutely and without condition to "any person who has an interest in the litigation," whether he be interested in the success of one or the other party to the action, or against both. Code of 1873, § 2683.

The manner of the intervention is provided by the same code, § 2685, as follows:

"The intervention shall be by petition, which must set forth the facts on which the intervenor rests, *and all the pleadings therein shall be governed by the same principles provided for in this chapter.* But if such petition is filed during the term, the court shall direct the time in which an answer shall be filed thereto."

No action by the court seems to be necessary to an intervention. The party who intervenes appears to have the same right to file his petition of intervention that the original plaintiff had to commence his suit. There is no provision for obtaining leave of court, and as he may file his petition at any time, "either before or after issue has been joined in the cause," it is clear that he may file it during a vacation, and therefore necessarily without leave of court. If filed during term the court shall direct the time in which the answer shall be filed. This is upon the supposition that the adverse parties are present, and are advised of the filing. If filed in vacation there is no provision as to the time of answering, except that it shall be governed by the rules prescribed for pleading in other cases. I think the intervenors correctly construed this provision as authorizing the service of notice to the adverse parties requiring an answer at the next term as in cases of original suits. This ruling is not in conflict with anything to be found in the case of *Barkdull v. Callanan*, 33 Iowa, 391. In that case a petition of intervention was filed in vacation, and the court distinctly say that such filing was "authorized by section 2932 of the revision," which is the same as

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section 2865 of the code of 1873, above quoted. The petition for intervention was afterwards, upon notice, stricken out, and leave to refile was refused. The court say: "We cannot determine the correctness of this ruling, for no exception was taken to it." There was a motion for change of venue, which was overruled; and the court say, properly, "because her petition of intervention had been stricken from the files," and she was, therefore, not a party. The case does not hold that leave of court is necessary to the filing of a petition of intervention, but, on the contrary, holds that such a petition may be filed in vacation, and therefore impliedly holds that it may be done without such leave.

A question is made as to whether it was necessary for intervenors to present their petition for removal to the state court. If this were a new question I should have grave doubts upon it; but it seems to be settled that the filing of a proper petition in the state court *ipso facto* removes the cause. *Osgood v. R. Co.* 2 Cent. L. J. 273; *Merchants', etc. Bank v. Wheeler*, 13 Blatchf. 218; *Connor v. Scott*, 4 Dill. 242; Article on Removal of Causes, 2 Cent. L. J. 730, and cases cited.

It has been suggested that this proceeding was not a suit in the state court within the meaning of the acts of congress, and therefore not removable. I am, however, of the opinion that the petition of intervention is in its nature a suit wherein the intervenors seek relief as against the defendants therein named, and the right of removal in such a case is not affected by the fact that the state court had appointed a receiver who was proceeding to wind up the affairs of the corporation. *Osgood v. R. Co.* 2 Cent. L. J. 273. If we assume that the subject matter of the controversy was in the possession of the state court, the right of removal still remains, as was distinctly held by the supreme court in *Kern v. Huidekoper*, 103 U. S. 485 (see pp. 490, 491).

The motion to remand must be overruled.

The question of the right of the intervenors to an injunction to restrain further proceedings until there can be a hear-

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ing upon the merits, was not discussed by counsel at the hearing, but I suppose the granting of that application follows as a matter of course. There would be no propriety in our entertaining jurisdiction of the case made by the intervening petition, and refusing to restrain the receiver from disposing of the estate and paying the debts now alleged to be fraudulent. A temporary injunction may therefore issue to restrain the defendants named in the petition of intervention, as therein prayed, until further order of the court, upon the intervenors giving bond with the usual condition, in the sum of \$2,000, with sureties to be approved by the clerk.

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SAME v. SAME.

(*Eastern District of Missouri. February, 1882.*)

1. GAMING LAWS—R. S. MO. §§ 5722-3—OPTION DEALS—NEGOTIABLE INSTRUMENTS.—An option deal is not a “gaming or gambling device,” within the meaning of the Missouri statutes, and a note given for a balance due on such a deal may be enforced by a *bona fide* holder for value, without notice, if indorsed to him before maturity.
2. NEGOTIABLE INSTRUMENTS—NOTICE.—Where a bank in the absence of a director, by whom a note has been offered for discount, accepts it, and accepts a note payable to him and indorsed to it as collateral, its rights are not affected by such director's knowledge of illegality in the inception of the note accepted as security.
3. SAME—SAME.—An indorsee for value of a promissory note is presumed, in the absence of evidence to the contrary, to have taken it without notice of equities subsisting between the maker and payee.
4. SAME—COLLATERAL SECURITY—DEMAND—BANKING.—Where a bank discounts a demand note for a depositor and receives another negotiable instrument as collateral, the liabilities of parties to the latter are not affected by a failure on the bank's part to make any attempt to collect such demand note when the maker has a sufficient sum on deposit to meet it.

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Motion for a new trial.

These causes being of a like nature were, by order of court, tried together.

TREAT, *District Judge*.—These causes of action were based on promissory notes executed by Harrison, to the order of Alexander, payable at the Third National Bank. Alexander indorsed and delivered said notes to said bank as collateral to secure a demand note by him to the bank. The indorsement and delivery of said Harrison notes were contemporaneous with the execution, delivery, and discount of the Alexander note under the following agreement:

“\$5,000. St. Louis, Missouri, October 4, 1878.

“On demand, after date, I promise to pay to the order of Third National Bank of St. Louis \$5,000, for value received; negotiable and payable, without defalcation or discount, at the Third National Bank of St. Louis, with interest at the rate of 10 per cent. per annum after maturity; having deposited in said bank as collateral security for this and other loans:

One note, J. W. Harrison, one year, August 28, 1878.....	\$1,188 29
“ “ two years, August 28, 1878	1,188 29
“ “ three years, August 28, 1878.....	1,188 29
“ N. F. Coffey, sixty days, September 10, 1878	1,072 35
“ N. F. & J. H. C., sixty days, September 11, 1878 ..	1,050 71

“Which ——— hereby authorized said bank, or its president or cashier, to sell without notice at the Merchants' Exchange, in the city of St. Louis, or at public or private sale, at the option of said bank, or of its president or cashier, in case of the non-performance of this promise, applying the proceeds to the payment of notes or evidence of debt held by said bank, including interest, and accounting to ——— ——— for the surplus, if any. In case of deficiency ——— ——— promises to pay to said bank the amount thereof forthwith, after such sale, with interest as above specified. The present cash market value of the above collateral security is ——— dollars; and it is understood and agreed, should there be any depre-

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ciation in the value of said security prior to the maturity of any note or claim held by said bank, such an amount of additional security shall be furnished by ——— as will be satisfactory to said Third National Bank; and should such additional security not be furnished within twenty-four hours after demand on ——— so to do, then and in that event said bank may proceed at once to sell, as above specified, the security herein named.

[Signed]

“CRAIG ALEXANDER.”

This agreement represented the transaction between the plaintiff and Alexander in regard to this loan then made. The debt of Craig Alexander to the plaintiff (secured by this agreement) is yet due; only \$500 has been paid on it. Alexander has paid the interest on this loan semi-annually.

The Coffey notes mentioned in this agreement have been renewed from time to time, and renewal notes for that part of the collateral (except \$500 which was paid thereon, and which was the credit mentioned as given Alexander in the main \$5,000 note) are yet current, in possession of the bank, not matured. These renewals of Coffey notes were all made through Alexander; the bank did not see Coffey in the transaction. Alexander would bring in the renewal note and the bank would take it and give up the old note to Alexander. Demand has never been made of Alexander for the payment of the \$5,000 loan. Craig Alexander has been director in plaintiff's bank during the period covered by the dealings mentioned in this case, and is yet such. In the bank it is customary, if a director wants a discount, to have him retire while his paper is being passed on. A memorandum is kept among the bank's papers, for the use of the bank, as receipt of the cashier to the discount clerk. This is numbered 3,470: “No. 3,470. THIRD NATIONAL BANK OF ST. LOUIS,

ST. LOUIS, 10 — 5 — 1878.

“Craig Alexander has deposited in this package containing collat. D. L. \$5,000, subject to ——— order or instruction.

[Signed]

“T. A. STODDARD, Cashier.”

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The bank had no notice of the transaction out of which the notes grew. Alexander had a large running account at the bank during this time, and was at various times indebted to the bank on general account.

Plaintiff offered in evidence the notes sued on in these cases. Defendant Harrison objected because same are incompetent and irrelevant, and because the pleadings do not deny execution of the notes, and because the notes are void under the Missouri statutes touching gaming and gambling devices. Objections were overruled by the court, to which ruling said defendant excepted at the time. Said notes were then read in evidence as follows:

[*Note No. 1.*]

“\$1,188.29. AULLVILLE, MISSOURI, August 28, 1878.

“One year after date I promise to pay, to the order of Craig Alexander, eleven hundred and eighty-eight and twenty-nine one-hundredths dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 8 per cent. per annum. Payable at Third National Bank of St. Louis.

“J. W. HARRISON.

[Indorsed:] “CRAIG ALEXANDER. W. Q. HARRISON.

[*Note No. 2.*]

“\$1,188.29. AULLVILLE, MISSOURI, August 28, 1878.

“Two years after date I promise to pay, to the order of Craig Alexander, eleven hundred and eighty-eight and twenty-nine one-hundredths dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 8 per cent. per annum. Payable at Third National Bank of St. Louis.

“J. W. HARRISON.

[Indorsed:] “CRAIG ALEXANDER. W. Q. HARRISON.

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[Note No. 3.]

“\$1,188.29. AULLVILLE, MISSOURI, August 28, 1878.

“Three years after date I promise to pay, to the order of Craig Alexander, eleven hundred and eighty-eight and twenty-nine one-hundredths dollars, for value received, negotiable and payable without defalcation or discount, and with interest from date at the rate of 8 per cent. per annum. Payable at Third National Bank of St. Louis.

“J. W. HARRISON.

[Indorsed:] “CRAIG ALEXANDER. W. Q. HARRISON.

“I hereby waive protest, demand, and notice of protest.

“August 31, 1881.

CRAIG ALEXANDER.”

For the purpose of this case it was then announced by counsel that the following facts were to be considered as agreed upon by the parties hereto, and received by court and jury as proved herein, viz.: That the plaintiff has had on deposit on general account, to credit of Craig Alexander, at various times since October 4, 1878, more than the sum of \$6,000; and that plaintiff has had on deposit on general account, to credit of Craig Alexander, at various times since the institution of this suit, more than the sum of \$6,000.

The plaintiff then rested. The defendant Harrison then requested the court to charge the jury as follows: “The court instructs the jury that on the pleadings and evidence herein the plaintiff is not entitled to recover.” But the court refused so to charge, to which ruling said defendant then and there excepted. Defendant Harrison then offered to prove the following distinct facts, to wit:

(1) That each and all of the notes sued on in these cases were originally executed between the maker and the payee, Alexander, for the sole consideration of money won by said Alexander and lost by said defendant Harrison at a game and gambling device known popularly as “option deals.”

(2) Said defendant also offered to prove all and singular the

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facts set up as defenses and recited in the answer of defendant Harrison on file in these causes.

But the court refused to admit such evidence, and rejected both said offers of proof as separately made, and to such ruling as to each of said offers the said defendant then and there duly excepted. The defendant then rested. The court then directed a verdict for the plaintiff in manner and form as found by the jury, to which direction and charge said defendant Harrison excepted at the time. The foregoing was all the evidence given and offered and proceedings had at said trial.

On the foregoing statement it is contended that there was error, because the bank, even if a *bona fide* holder for value, could not exclude from the consideration of the jury the original transactions between the maker and payee of the notes as void under the "gaming laws of Missouri." It may be admitted that as all the parties to these notes are, for legal purposes, resident in Missouri, the contracts are Missouri contracts, and subject to the laws of this state. Said gaming statute is in the following words:

"Sec. 5722. *Bonds, etc., founded on gaming consideration, void.* All judgments by confession, conveyances, bonds, bills, notes and securities, when the consideration is money or property won at any game or gambling device, shall be void, and may be set aside and vacated by any court of competent jurisdiction, upon suit brought for that purpose by the person so confessing, giving, entering into, or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser, or other person interested therein.

"Sec. 5723. *Assignment of, shall not affect the defense.* The assignment of any bond, bill, note, judgment, conveyance, or other security shall not affect the defense of the person executing or confessing the same."

This act came under review at an early day by the supreme court of the state of Missouri, when the distinction was

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sharply drawn between gaming and gambling devices, and mere betting on uncertain events.

Under the statute 9 Anne, c. 14, § 1, it was held (*Bowyer v. Bampton*, 2 Strange, 1155) that notes given for money lost at gaming were void, even in the hands of innocent indorsees for value. To the same effect are *Lowe v. Waller*, 2 Doug. 716; *Lloyd v. Scott*, 4 Pet. 222; *Thompson v. Bowie*, 4 Wall. 463. We have been referred to the following authorities as shedding light on the question: *Chitty*, Bills, 95; *Daniell*, Neg. Inst. § 197; *Ackland v. Pearce*, 2 Camp. 599; *Shillits v. Snee*, 7 Bing. 405; *Henderson v. Benson*, 8 Price, 281; *Chapin v. Dake*, 57 Ill. 296; *Manning v. Manning*, 8 Ala. 138; *Hatch v. Burroughs*, 1 Woods, 439; *Unger v. Boas*, 13 Pa. 601; *Mordecai v. Dawkins*, 9 Rich. (S. C.) 262; *Vallett v. Parker*, 6 Wend. 615; *Weith v. Wilmington*, 68 N. C. 24; *Jordan v. Locke*, Minor (Ala.), 254; *Stone v. Mitchell*, 7 Ark. 91; *Eagle v. Kohn*, 84 Ill. 292; *Thompson v. Bowie*, 4 Wall. 463.

The principle may be considered well established that when a statute pronounces a gaming or usurious contract absolutely void, no recovery can be had thereon. The gaming statute of Missouri destroys the negotiable character of a note, or other obligation, given for a gaming consideration within the terms of that statute. The doctrine that void transactions cannot acquire validity by transfer of paper obligations based thereon finds full sanction not only in authorities (*supra*), but in the many bond cases before the United States supreme court. 4 Wall. 463; 102 U. S. 278, 625; 103 U. S. 580; 94 U. S. 429.

The broad distinction remains between contracts void *ab origine*, by force of statutes whereby assignees and indorsees are unprotected, and contracts *contra bonos mores*, which cannot be enforced between the original parties thereto, but are held enforceable when, being negotiable in form, they have passed to innocent holders for value.

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The notes in question were, it must be held for the purposes of this motion, given for balances on an "option deal," an illegal contract; being, as alleged, a mere betting transaction on future prices, with no purpose of delivering or receiving the articles concerning which the bet was made. If the allegations of the answer are true, Alexander could not recover on the notes in suit; and the court was in doubt whether the position the bank occupies should not be considered as exceptional, and thus open the equities between the original parties. It is evident that the bank could at divers times have collected Alexander's demand note and turned over to him the collaterals; and it seemed that defendants' position had great force, viz.: that the transfer of Harrison's notes as collateral to the bank under the circumstances was merely for the purpose of excluding the equities between the original parties. Still the stubborn fact remained that the bank is a *bona fide* holder for value within the rules laid down by the United States supreme court in *Swift v. Tyson* and *Goodman v. Simonds*, no evidence being given that the bank had notice of the infirmity of the paper.

The court holds that the transaction in question is not within the terms of the gaming laws of Missouri, but if it was an option deal, as charged, would be unenforceable between the original parties. and even in the hands of an innocent indorsee for value.

The distinction is so clearly drawn, and the doctrines so exhaustively considered by Judge Thayer, of the St. Louis circuit court (with whose manuscript opinion in the *Tinsley Case* I have been favored), that it would be a mere repetition of what has been thus so ably done, to attempt to travel over the same ground, and hence I quote largely from his opinion as follows:

"The law is now well settled, in all of the states where the question has arisen, that there can be no recovery had upon a contract or sale of personalty where the parties to such contract do not intend an actual delivery of the articles

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bargained for, but merely intend to settle differences at some future day between the price agreed to be paid for the commodity and the *then* market price. Such contracts are universally held to be invalid, as against public policy, and in some instances they have been held to be in violation of statutes relative to gaming and wagers. *Lyon v. Culbertson*, 83 Ill. 33; *Sampson v. Shaw*, 101 Mass. 145; *Kirkpatrick v. Bonsall*, 72 Pa. 155; *Gregory v. Wendell*, 39 Mich. 337; *Rumsey v. Berry*, 65 Me. 570; *Williams v. Tiedemann*, 6 Mo. App. 269. But there is an apparent conflict of opinion touching the question whether a broker, factor, or commission merchant, who has been employed by his principal to make contracts of this character with some third party, and has done so in his own name, but for his principal's benefit, may maintain an action against his principal to recover money expended for his principal at his principal's request in the settlement of losses accruing under such contracts. This precise question was considered in the *Case of Green*, 15 N. B. R. 201 (U. S. Dist. Court, W. D. Wis.), and it was there held that the *broker could not recover* from his principal for moneys thus expended in the settlement of losses on such illegal ventures. But it is to be observed that the court, in the case last cited, based its decision mainly on a statute of Wisconsin, which declared all 'notes and agreements *void* that had been given for repaying any money knowingly advanced for any betting and gaming at the time of such betting or gaming.' And the evidence in the case cited showed that the broker not only made the illegal contracts in question, but that he advanced the money for the venture. The court accordingly held that the case fell within the statute, and that the broker could not recover money thus knowingly advanced in furtherance of a gambling transaction.

"There are other cases, arising between factors and brokers and their principals, which the courts have apparently treated as though the action was between the principals to the illegal transaction. But the different relation existing between

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the agent and his principal, in actions by the former to recover moneys expended for his principal in the settlement of losses on wager contracts, was apparently not called to the attention of the court. *Vide Gregory v. Wendell, supra; Williams v. Tiedemann, supra.*

“On the other hand, the law is well settled in England that if a broker be employed to make wager contracts, such as are voidable under 8 & 9 Vict. c. 109, § 18, and at the request of his principal the broker pays the amount due under such contract, *he can recover the amount so paid from his principal*, and the illegal nature of the contract with reference to which the money is paid is no defense to an action founded on such claim. *Warren v. Billings*, 33 Law Jour. (1864) 55, N. S. Common Law, Michaelmas term, 1863; *Pidgeon v. Burslem*, 3 Exch. 465; *Jessopp v. Surtoryche*, 10 Exch. 614.

“In this country the same doctrine has been held substantially in the following cases: *Lehman v. Strassberger*, 2 Woods, 554; *Warren v. Hewitt*, 45 Ga. 501; *Clark v. Foss*, 10 Chicago Leg. N. 213.

“In the case of *Marshall v. Thurston* the court says: ‘We understand the charge of the lower court to be, in substance, that if the broker knowingly assisted the defendant by an advance of money and active agency, though not as principal, to gamble in the rise and fall of bonds, no recovery can be had; but if the broker merely acted as his agent in effecting contracts between him and third parties for the purchase or sale of bonds on time, the defendant and third parties intending to speculate in the rise and fall of prices, and defendant suffered losses which were paid by the broker at defendant’s request, or were paid and the payments subsequently ratified by the defendant by executing notes therefor, a recovery can be had. In this view the charge is supported by the authorities.’

“The rule which has the support of the great weight of authority (whatever may be thought of the policy and moral-

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ity of the rule) seems to be as follows: If a factor, broker or commission merchant be employed by his principal to buy or sell commodities for the purpose of speculating on the rise and fall of prices merely, and the agent buys or sells in his own name, but on his principal's account, and subsequently, after losses have occurred in such transactions, the agent advances money at his principal's request to pay such losses; or if the agent pay such losses and the principal afterwards executes notes in the agent's favor to cover the amounts so advanced, the agent may recover against his principal the advances so made at his request, or upon the notes so executed, notwithstanding the illegal character of the original venture. The promise implied in the one instance and expressed in the other is neither void for want of consideration nor tainted with illegality. It was even held in the case of the *Planters' Bank v. Union Bank*, that where the defendant, in violation of law, had sold bonds for the plaintiff and received the proceeds, the plaintiff might recover the amount from the defendant, and that the illegal character of the transaction out of which the fund arose was no defense.

"But, on the other hand, if a broker or factor supply his principal with funds for the express purpose of enabling him to engage in illegal transactions, and if he (the agent) conducts the illegal venture in his own name, it seems clear that he becomes a *particeps criminis*, and the law will not aid him to recover moneys advanced for such purpose, nor will it enforce securities taken therefor.

"The facts proven in the case at bar seem to bring the case within the principle last stated. The original notes involved in this controversy, of which those in suit were mere renewals, were not given after the various contracts had been settled, to cover losses which the agent had paid for his principal. The notes seem to have been drawn by the principal in favor of his agent at the inception of the alleged illegal ventures, or within a few days thereafter, while the transactions were still pending and the result undetermined.

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They were either given to secure moneys advanced by the broker to his principal to enable the latter to prosecute the ventures, or they were given as an indemnity to the broker, to shield him from losses that he might sustain while carrying out the alleged illegal ventures in his own name, but on his principal's account.

"In either event, it would follow that the agent could not recover on these notes as against his principal, the maker of the notes, if the contracts or 'deals,' as they are termed, were mere wagers on the fluctuations in the market price of grain, and for that reason unlawful. Obligations thus intimately connected with an illegal transaction, and furnishing an inducement to the same, could not be supported as between the original parties, nor could they be enforced by the present plaintiff if it took the same with knowledge of this infirmity.

"I have no difficulty whatever in finding from the evidence that the parties, both principal and agent, had in view mere *wager contracts* upon the price of grain, and that the losses which the agent or broker eventually paid were paid on contracts which, as between the broker and the parties with whom he dealt, were mere bets upon the future market price of wheat, no delivery having been made or contemplated. To find otherwise on the evidence before me would involve a degree of credulity which the court does not possess.

"The case is thus narrowed to the single inquiry whether the plaintiff bought this paper with knowledge that it was not enforceable as between the maker and payee.

"The defendant would charge the plaintiff with knowledge because the payee of the note was one of plaintiff's directors, and *ex officio* a member of the board of discount. The evidence shows, however, that the bank (the plaintiff in this action) had no regular discount committee. The president was authorized to pass upon paper without the advice of the directory. If the directors were present, they gave advice

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on paper offered for discount. But in the present instance it appears that the originals of the notes now in suit were accepted in the absence of the director. The director states that when he had paper of his own to offer for discount he stayed away from the board, and that he did so in this instance. Upon this state of facts I am clearly of the opinion that the bank cannot be charged with knowledge of facts possessed by the particular director, who was not present and did not act as member of the board when the paper was accepted. The director was himself the payee, and was offering this paper for discount. Whatever contract the bank made in accepting the paper and passing it to the director's credit, was made with the director. He not only *did not assume* to act as agent of the bank in this particular transaction, but he could not lawfully act in that capacity had he so attempted. *Washington Bank v. Lewis*, 22 Pick. 31.

"The present case is widely different from the case of *Bank v. Thomas*, 2 Mo. App. 367, cited for the defendants; for in that case the paper was tendered by a *third party*, and the director, whose knowledge was held to affect the bank, was present at the meeting of the committee on discount, and voted upon the paper in the discharge of his regular duties as a bank officer. In the present case the bank cannot be charged with notice of any infirmity in the paper by any sound rule of law with which I am acquainted. Neither does the court concur in the view that the notes in suit are void in the plaintiff's hands, regardless of the question of notice, by virtue of the provisions of the act respecting gaming. R. S. 1879, ch. 109.

"In the case of *Hickerson v. Benson*, 8 Mo. 8, it was held in this state that a wager on the result of an election was not within the terms of the statute respecting gaming, although such wagers were against public policy and sound morality, and void on that ground. And such seems to be the correct view with respect to immoral and fictitious sales of grain and other commodities, where *no delivery is in-*

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tended by the parties. Such contracts are simply *contra bonos mores*, and the courts will not enforce them, and would not enforce them in the absence of any statute on the subject of gaming. The result is that judgment must be entered on the notes against both of the defendants for the principal and accrued interest."

The petitions aver that the notes were assigned to the plaintiff; and defendant Harrison contends that, therefore, the equities were open. The difference between indorsement and mere assignment is one well known, and the point is well taken, if not cured by what occurred at the trial, and the verdict. See Daniell, Neg. Inst. §§ 729, 741, 745; *Hedger v. Lesby*, 9 Barb. 214; *Calder v. Billington*, 15 Me. 398; *Hadden v. Rodkey*, 17 Kan. 429.

The usual form of pleading is, when such is the fact, that the notes were indorsed to plaintiff; for the rights springing therefrom are quite different from those arising from an ordinary assignment. Hence, the defendants' position in that respect is technically correct; but as the notes produced and the evidence showed an indorsement to plaintiff, an amendment would have been allowed if attention had been called to the defect. Consequently, the verdict, under the rulings and proofs, must be held to cure that technical error; or, if need be, permission given to make the pleadings correspond to the evidence and verdict.

As Alexander was a director in the bank, it is contended that the bank is, in law, charged with knowledge of what was known to him, and the following cases are referred to in support thereof: *Lemoine v. Bank*, 3 Dill. 49; *Bank v. Davis*, 2 Hill (N. Y.), 451; *Bank v. Thomas*, 2 Mo. App. 367; *Bank v. Campbell*, 4 Humph. 394; *Toll Bridge Co. v. Betsworth*, 30 Conn. 380.

While the general doctrine is recognized that what an agent knows his principal is charged with notice of, in transactions where said agent is acting for the principal, yet a bank director, in asking for a discount of his own paper, is not an agent of the bank, but acting as the adverse contracting

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party. Were this held otherwise, no bank could discount paper, to which a director is a party, without losing the position of an innocent indorsee for value under the law merchant. Hence, no bank could have dealings in commercial paper with any of its directors on ordinary business principles. The opinion of Judge Thayer states the legal aspect of this question very clearly.

It is further contended that inasmuch as Alexander had frequently on deposit, both before and after this suit brought, a sufficient sum of money to pay his demand note, it was the legal duty of the bank to demand payment thereof, and apply his deposits accordingly, thus leaving the collateral discharged of all interest therein by the bank. On this point the court has no difficulty, so far as the legal right of the bank to pursue the collaterals is concerned; yet it would seem that a failure by the bank to take pay for the demand note, and then sue Alexander as indorser of the collaterals, and Harrison, the maker, indicated other than a purpose to collect its demand against Alexander, who was its principal debtor. It had a prompt recourse against him; indeed, had funds in its own hands sufficient to discharge the indebtedness. Why, then, sue him and Harrison, unless its object was, under the formal position of an innocent indorsee for value, to enable Alexander thus to cause a contract to be enforced in his favor which the law would not permit him to enforce in his own name?

It would be easy for the Missouri legislature to destroy, by statute, the negotiability of such paper, but until it has done so the courts must apply the law merchant to its transfer. To what extent inquiry is permissible into the position of parties, as in the case at bar, may be doubtful. The bank can elect its own course by proceeding against Alexander alone on his demand notes, or by enforcing its rights against the collaterals, or possibly by appropriating his deposits to the payment of his indebtedness. While courts should lend no encouragement to betting contracts, yet, so far as the law requires the protection of innocent indorsees of commercial

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paper, the rules pertaining thereto must be observed. It is obvious that the law may be evaded by giving negotiable notes and having them indorsed to innocent parties; but the remedy is with the legislature. It is said the contract indorsing the collaterals to the bank gave it only the power to sell the same, and not to collect them by ordinary process of law. As indorsee, the right to sue was complete, and the power to sell was an additional advantage which it might or might not exercise. But the question still remains, viz., should not the court have permitted the exact relationship of the parties to these notes to have been developed, to the end that no merely technical screen should be interposed to prevent the defeat of illegal transactions?

The testimony produced, and uncontradicted, proved that the ordinary course had been pursued as to the transfer of the collaterals, without notice of any defect therein, or of any outstanding equities between maker and payee. Any testimony contradictory thereof, whereby the legal relationship of the parties could be varied, would have been proper; but the contention was that, despite the direct testimony of the cashier, the facts and circumstances indicated that the bank was aiding Alexander to shut out the equities by holding the collaterals, notwithstanding it could have collected the principal or demand note at any time, and thus have released the collaterals. But it was for the bank to continue the demand loan or call it in, as it might determine. It was satisfied with the interest-bearing arrangement, and to take the course which it has done, and which it had the legal right to do. However suspicious the relations of the bank with Alexander may appear as to this point, they cannot overcome the direct and express testimony of the cashier as to the *bona fides* of the indorsements and the consideration therefor.

The motions are overruled.

Dyer & Ellis, for plaintiff.

Marshall & Barclay, for defendants.

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**RALSTON and others, Trustees, etc., v. CRITTENDEN, Governor
of the State of Missouri.**

(Western District of Missouri. February, 1832.)

1. **ACT OF THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI TO PROVIDE FOR REDUCING THE INDEBTEDNESS OF THE STATE, APPROVED FEBRUARY 20, 1865, CONSTRUED.**—Where a state issued coupon bonds to a railroad company as a loan of credit, upon condition that said company should provide for the payment of the interest and principal of such bonds, and upon condition also that the state should have a first mortgage upon said company's road to secure the payment of said bonds and interest; and where the general assembly of said state subsequently provided by statute that in case said company should thereafter issue coupon bonds of a certain description, and should convey its franchises and property, subject to the lien of said state, to trustees, to secure the payment of such bonds and coupons, and such trustees should pay into the state treasury "a sum of money equal in amount to all indebtedness due or owing by said company to the state, and all liability incurred by the state by reason of having issued her bonds and loaned the same to said company, . . . together with all interest that has and may, at the time when such payment shall be made, have accrued and remained unpaid by said company,"—it should be the duty of the governor of the state, upon the fact of such payment being certified to him as therein provided, to assign to said trustees, for the benefit of the holders of said company's bonds issued as aforesaid, the lien and mortgage held by the state; and where trustees, to whom said company thereafter conveyed its road, etc., subject to said lien, to secure the payment of bonds issued by it, paid into the state treasury, as a payment of all liability due by said company to the state in consequence of said loan of credit, a sum of money equal in amount to the face value of all outstanding bonds issued by the state to said company, and the interest which would come due thereon on the first of the following July, but failed to obtain an assignment of the state's lien, and only received a receipt on account: *Held*, that said state had a right to enforce its lien against said road in case of failure on said company's part to pay when due the interest coupons maturing on the following January; and that said trustees were not entitled, by the terms of said act of 1865, to an assignment of the lien of said state, unless they paid into the treasury of said state a sum equal in amount to the face value of all outstanding bonds issued by said state as aforesaid, and all outstanding coupons which were, or had been, attached to said bonds, whether *due* or not, together with all other indebtedness due or

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owing by said company to said state by reason of the latter having issued its bonds as aforesaid, or paid interest thereon.

2. **SAME — ARTICLE 4, § 50, AND ARTICLE 15, § 1 OF THE SCHEDULE OF THE CONSTITUTION OF THE STATE OF MISSOURI OF 1875, CONSTRUED.**— Said act of 1865 was not repealed by the articles of the constitution of the state of Missouri, approved November 30, 1875, by which it is provided that the general assembly shall have no power to release, alienate, or alter the lien held by the state upon any railroad, but that the same shall be in force in accordance with the original terms upon which it was acquired, and that the provisions of all laws inconsistent with said constitution should cease upon its adoption.
3. **ACT OF MARCH 29, 1881, CONSTRUED.**— Where the legislature of the state, in anticipation of the payment into the treasury of \$3,000,000 on account of the state's claim against the railroad under the legislation above named, provided for the investment of the same so as to cancel outstanding obligations of the state bearing interest, and so as to earn an income, and making it the duty of certain officers of the state to make such investment, *held*, that as between the state and the railroad company in a settlement of their differences touching the duty of the company to provide for outstanding and unmatured interest coupons, the state is chargeable in equity with whatever would have been realized if said sum had, when paid in, been invested as required by the act.
4. **STATUTE — WHEN TO BE CONSTRUED AS MANDATORY.**— Even where the terms of a statute are permissive only, and merely authorize a public officer to do a certain act, it will be construed as mandatory, if the public interest or individual rights call for the exercise of the power conferred.

Motion for an injunction.

This was a motion *pendente lite* to restrain Thomas T. Crittenden, governor of the state of Missouri, from selling, or advertising for sale, the Hannibal & St. Joseph Railroad. The facts upon which the motion was based are substantially as follows:

On February 22, 1851, an act was passed by the legislature of Missouri providing for the issue of state bonds, in the sum of one and a half million dollars, to the Hannibal & St. Joseph Railroad Company, as a loan of credit to said company. It was provided in that act that the bonds to be issued shall be redeemable after twenty years from date,

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bearing six per cent. interest, paying semi-annually in New York. They were made payable to the order of and delivered to the company, and transferred by the indorsement of the president thereof. On delivery of the bonds the company should file its certificate of acceptance thereof, in the office of the secretary of state, under its corporate seal and the signature of its president.

The following are the remaining material sections of said act:

“Sec. 4. Each certificate of acceptance so executed and filed as aforesaid shall be recorded in the said office of the secretary of state, and shall thereupon become and be, according to all intents and purposes, a mortgage of the road of the company, executing and filing their acceptance as aforesaid, and every part and section thereof, and its appurtenances, to the people of this state, for securing the payment of the principal and interest of the sums of money for which such bonds shall, from time to time, be issued and accepted as aforesaid.”

“Sec. 9. Each of said companies shall make provision for the punctual redemption of the said bonds so issued as aforesaid to them, respectively, and for the punctual payment of the interest which shall accrue thereon, in such manner as to exonerate the treasury of this state from any advances of money for that purpose; and the tolls and income which shall accrue from the use of their said roads, respectively, when the same or any part thereof shall be constructed, after paying the repairs and the necessary expense of operating the same, and conducting the business thereof, shall be and are hereby pledged for the payment of said interest.”

“Sec. 11. In case the said companies, or either of them, to which bonds shall as aforesaid be issued, shall make default in the payment of either interest or principal of the said bonds, or any part thereof, no more bonds shall thereafter be issued to such delinquent company, and it shall be lawful for the governor to sell their road and its appurte-

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nances, by auction, to the highest bidder, first giving at least six months' notice of the time and place of such sale, by advertisement, to be published once in each week in the paper which shall publish the laws at Jefferson City, and in two public newspapers printed in the city of St. Louis; or to buy in the same at such sale, for the use and benefit of the state, subject to such disposition in respect to such road, or its proceeds, as the legislature may thereafter direct." Legis. Acts 1850-1, p. 265.

Between July 1, 1854, and July 1, 1857, inclusive, bonds to the amount of one and a half million dollars, redeemable in twenty years, were issued and received by the company under the provisions of said act. The coupons were payable January 1st and July 1st of each year. On December 10, 1855, another loan of credit of one and a half million dollars was made to said company on the same terms and conditions as that of 1857.

Under this act of 1855 bonds were issued to the Hannibal & St. Joseph Railroad Company, to run for thirty years, at six per cent. interest, payable January and July 1st, as follows: \$500,000, dated November 10, 1856; \$1,000,000, dated February 28, 1857.

On February 20, 1865, the Missouri legislature passed an act, the first section of which is as follows:

"Section 1. The Hannibal & St. Joseph Railroad Company is hereby authorized to issue its bonds, signed by the president and countersigned by the secretary of the company; in sums of \$1,000 each, with coupons attached, bearing interest, payable semi-annually, at the rate of six per cent. per annum, and having not less than ten years to run, and to the amount of three millions of dollars; the payment of the same, with the accruing interest, to be secured by a mortgage or deed of trust, conveying to three trustees to be named therein, by and with appropriate forms of expression, and for the purpose of securing the payment of said bonds and interest, and for no other purpose, on the road of said

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company, with all its franchises, rolling stock, and appurtenances; subject, however, to all the liens and liabilities existing in favor of the state by virtue of any law of the state at the time said bonds may be issued and delivered."

The remaining sections, so far as material, are set forth in the opinion of the court. The bonds issued under the act of 1851 were renewed, with one exception, under an act passed March 21, 1874, and the renewal bonds will mature as follows: July 1, 1894, \$500,000; July 1, 1895, \$203,000; January 1, 1896, \$165,000; July 1, 1896, \$614,000; July 1, 1897, \$17,000.

The railroad company did not offer to take advantage of the act of 1865 until April 30, 1881, but on that day it conveyed its property to the complainants, as trustees, to secure an issue of bonds to the amount of \$3,000,000, which bonds the complainants charge were sold in the market, and the proceeds thereof delivered to the state treasurer on June 20, 1881, in payment of all liabilities due by the company to the state in consequence of the aforesaid loan of credit.

It is now claimed by complainants that the \$90,000 was for the purpose of paying the coupons due by the state on July 1, 1881, and that the \$3,000,000 were paid in full discharge of the outstanding bonds and interest thereafter to mature.

The state treasurer accepted the money on June 20, 1881, placing the \$3,000,000 in the treasury, and forwarding the \$90,000 to New York for the purpose of meeting the coupons maturing ten days thereafter.

The treasurer executed a receipt in the following words, to wit:

"Received of R. G. Ralston, Heman Dowd and Oren Root, Jr., trustees of the Hannibal & St. Joseph Railroad Company, the sum of three millions and ninety thousand dollars, on account of the statutory mortgage now held by the state of Missouri against the said railroad.

"P. E. CHAPPELL, *State Treasurer.*"

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But said treasurer refused to receipt for said sum as a payment in full compliance with the act of 1865; and also refused to certify to the governor that the requirements of said act had been fully complied with by said trustees. The railroad company failing to pay the interest coupons maturing January 1, 1882, the governor of the state, the defendant, determined to advertise and sell the road because of such default.

The complainants thereupon made said motion for an injunction, claiming that the requirements of said act of 1865 had been fully complied with by them, and that the respondent had therefore no right to sell said road as he had threatened.

The defendant answered that section 50, art. 4, and section 1, art. 15, of the constitution of the state of Missouri, adopted November 30, 1875, had operated to repeal said act of 1865, and that the supreme court of the state had so decided.

Said sections of the constitution of Missouri are respectively as follows:

"The general assembly shall have no power to release or alienate the lien held by the state upon any railroad, or in anywise change the tenor or meaning, or pass any act explanatory thereof, but the same shall be in force in accordance with the original terms upon which it was acquired."

"The provisions of all laws which are inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this constitution as required legislation to enforce them, shall remain in force until the first day of July, 1877, unless sooner amended or repealed by the general assembly."

The opinion of the supreme court referred to was rendered in the case of the *State of Missouri ex rel. v. Chappell, State Treasurer*, which was instituted at the relation of the complainants herein, at the October term, 1881, of said court,

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asking said court to compel the state treasurer by *mandamus* to execute his certificate in conformity to said act of 1865.

It appears that the supreme court of Missouri refused to grant the *mandamus*, on the ground that said act of 1865 was repealed, as contended, by the constitution of 1875; but it also appears that the question of the *validity* of said act was not raised in said case, either by the pleading or the argument of counsel, and that the only question submitted to the court was as to whether or not the conditions of the act had been fully complied with.

The defendant further contended that the terms of said act of 1865 had not been complied with.

Geo. W. Easley, for complainants.

John T. Dillon, Elihu Root and Wager Swayne, of counsel.

D. H. McIntyre, Attorney General, for defendant.

Glover & Shepley and Henderson & Shields, of counsel.

In answer to an inquiry at the close of the argument by Mr. Glover, as to when the motion would be decided, Miller, Justice, said:

We will decide it now, because all three of us are agreed upon so much as is necessary to enable us to make an order refusing this application for an injunction. When that is done, the case remains, anyhow, as it is not here for final decision, and what may come of it hereafter will be seen. The reason why I say we are all agreed that the application for this injunction cannot be sustained is that we do not agree with the complainants' construction of the act of 1865. Looking at the language of the second and third sections of that act, which contain the operative words of the statute, and looking at it with a view to the nicest criticism upon the words themselves, before referring back to the prior legislation and to the general circumstances, we are of opinion that

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it does not justify the claim of the complainants. The part of the second section which it is necessary to consider reads thus: "Whenever the trustees provided for in the first section of this act shall pay into the treasury of the state a sum of money equal in amount to all indebtedness due or owing by said company to the state, and all liabilities incurred by the state by reason of having issued her bonds and loaned the same to said company as a loan of the credit of the state, together with all interest that has, and may at the time when such payment shall be made, have accrued and remain unpaid by said company, and such fact shall have been certified to the governor of the state by the treasurer," the governor shall assign this statutory lien.

The object of this bill is to procure an assignment of the statutory lien, because the complainants say they have complied with the requirements that I have just read. It is their contention that when they paid the \$3,000,000, which was the principal of all the bonds that the state was liable for on account of the Hannibal & St. Joseph Railroad, and had paid the installment of interest then just due and accrued, they had complied with this statute. Whatever opinion they may entertain now, that is certainly all they have done, and all they claim to have done. They do not claim that they have done anything more to relieve, remove or discharge any other liability that the state may be under on account of those bonds.

Now, looking at the language of the statute critically, let us see if there are any other liabilities of the state on account of those bonds which these complainants ought to have extinguished or provided for before they could make this demand. The statute seems to have been drawn with a great deal of care; it seems to have been drawn by a man who evidently knew how to use words, for he uses them well; and applying the well-known rule, that every word in a statute, and especially in the important part of it, like this, ought to have a meaning, and a distinct meaning, if there is a place for it, we

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come to this: What is it they are to do? They are to "pay into the treasury of the state a sum of money equal in amount to all the indebtedness due or owing" to the state. There has been no comment here on those two phrases. It is obvious they have a different meaning. A man may owe \$10,000,000 and not a dollar of it may be due. It may be ten years before a dollar of it is due, or before a cent of interest is due upon it, because if the interest falls due at odd times it is only by an express provision and not an implied one; therefore the drawer of this bill said: "All indebtedness due," that has to be paid; "all indebtedness owing," that has to be paid; and then "all liabilities incurred by the state by reason of having issued her bonds." It is my opinion that the interest was owing as much as the principal. I do not know but what that would have been the case if it had merely read, like an ordinary bond, that the state agreed to pay the bond and interest at the rate of six per cent., payable annually. I do not know but what all of the interest up to the end of the time the bonds ran would be held to be owing in that case. But, whether that be so or not, I am very sure that when the bond issued has a separate obligation for each one of these installments of interest — a kind of obligation which our court has held, and which all courts now hold, is capable of a distinct suit, and is so far a separate obligation,—that the statute of limitations applicable to the bond is not applicable to the coupon, but begins to run against the coupon, according to its nature, from the time it falls due, and not against the bond,—I say that when the state of Missouri had out so many of these pieces of paper, they were each an item of debt owing at the time this transaction occurred. They did not need to resort to the word "liabilities;" but, to make that which might have been clear a little clearer, and to prevent any mistake whatever, they use that word, which covers everything. Whatever the state had become liable for under her issue of those bonds was to be paid by a sum of money equal to it, if paid in money, before the right

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to the assignment of the statutory lien accrued; and this has not been done.

This view of the matter receives illustration from another clause. By the third section of the act of 1865, the complainants can entitle themselves to receive this assignment without paying a dollar in money to the governor or into the state treasury. That was an obligation which had its condition, and it throws light upon the other. And what is that obligation? "The treasurer of this state is hereby authorized and directed to receive of the trustees aforesaid, in payment of the \$3,000,000 and interest"—that has to be paid—"as provided in the second section of this act;" that is as much as to say: "By section 2 of this act we did provide that for the payment of \$3,000,000 and interest the treasurer might receive any of the outstanding bonds of the state bearing not less than six per cent. interest, or of the unpaid coupons thereof at their par value." He not only could receive the bonds, but you might go round, if it would do you any good, and buy up these coupons and pay the debt in that way. At all events, it is quite clear, taking those two sections together, that the legislature intended that the coupons to the bonds were to be provided for as well as the bonds themselves. That view of it is confirmed also by the original act of 1851. The fifth section of that act is: "The said bonds thus issued to the Pacific Railroad Company shall be denominated 'Pacific Railroad state bonds,' and the said bonds thus issued to the Hannibal & St. Joseph Railroad Company shall be denominated 'The Hannibal & St. Joseph Railroad state bonds;'" and the faith and credit of this state are hereby pledged for the payment of the interest"—interest being mentioned first—"and the redemption of the principal thereof." Now, that was an obligation which the state assumed in the original act, that she would pay the interest and redeem the principal. Section 9 says: "Each of said companies shall make provisions for the punctual redemption of the said bonds so issued as aforesaid to them, respectively, and for the punctual payment of the in-

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terest which shall accrue thereon, in such manner as to exonerate the treasury of this state from any advances of money for that purpose."

The state obliged herself to pay the interest, and she also obliged the Hannibal & St. Joe Railroad Company to pay the interest which should accrue thereon; not only what the state had paid, but "in such manner as to exonerate the treasury of the state from any advances of money for that purpose."

Can we believe that when the act of 1865 came to be passed by the state it intended anything less than this? Can we believe that it intended to modify that principle as to what should be paid, what should be secured, or how she should be indemnified; that it intended to make it any less strong or secure than it was; or that any less should be demanded or paid than was required by the act of 1851? On the contrary, the very language which I have read and undertaken to criticise attempts to make more emphatic the liability of the company. It says all indebtedness which is due, which is owing, and all liability. It has added other words distributively to enforce the principle that the state is to lose nothing; that she is to suffer nothing; that whenever you come in and want to get rid of this statutory mortgage, or, rather, have it turned over to you (for you do not merely get rid of it—you keep it alive to have it turned over to you), you are to do certainly as much as was required by the act of 1851, and if anything had occurred since that requiring you to do more, you are to do it. It says, "all liabilities."

I have no question, and neither have my brethren on the bench, that that is the true and sound construction of the act of 1865, and inasmuch as that has not been done, the power vested in the governor by the original act of 1851, to sell on default of interest, remains.

It is said, however, that since the state has accepted the principal, and the amount of interest that may be yet due by these trustees or the railroad company, or the obligation

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that may yet rest on them, is uncertain, and has not yet been ascertained, we must, by injunction, restrain the governor from selling. That is a misapplication of the doctrine on that subject. The governor is endeavoring now to enforce the payment of a sum which is ascertained and well known. It is the last past-due installment of interest, which amounts to \$90,000, I suppose. There is no difficulty about it. If you want to pay it, well and good; if you do not, the governor has a right to sell. What will happen after the sale, it will be time enough to consider then. You can prevent it. If you want your road, go and pay this \$90,000,—that is, by saving the state from the obligation of paying it; or, if the state has paid it, by repaying it to her; and, when that is done, if this particular proceeding is not stopped by the governor, we will stop it. But I have no idea that there will be any occasion for a resort to that. The governor will never want to do any more than make you pay this interest as it accrues, and save the state harmless.

Perhaps I ought to stop there, because that decides the motion before us, and I may not be here if the case ever comes up on anything else. But I think it not inappropriate to make a remark or two further, with a view of seeing if the state and the complainants cannot be brought together in such a manner as to prevent a great and unnecessary loss—a loss which might be prevented if each party would do what there is some moral obligation to do; and in some respects, I will say, what there may be a legal obligation to do. I am of opinion that the decision of the supreme court of the state does not preclude us from holding the act of 1865 valid, in the view that we take of it, whatever it might be if it was construed as complainants say it should be. I am of opinion, therefore, that the act of 1865 is a subsisting, valid act, and a rule of moral and legal obligation for the state and for these parties complainant. I am also of the opinion that the state, having accepted or got this money into her possession, is under a moral obligation (and I do not

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pretend to commit anybody as to how far its legal obligation goes) to so use that money as, so far as possible, to protect the parties who have paid it against the loss of the interest which it might accumulate, and which would go to extinguish the interest on the state's obligations. I am of opinion, also, that it is the duty of these gentlemen, if they further seek to get the benefit of this statutory lien, to indemnify the state absolutely against any loss that may accrue on account of the unpaid interest on these three millions of bonds.

I do not know that I ought to say anything about the particular manner in which that should be done. I think I am quite safe in saying that if they will go and purchase up and get cut off of any six per cent. bonds of the state of Missouri as many coupons as will amount to the coupons on these \$3,000,000, and present them to the governor, they ought to have the assignment of this statutory lien. Of course, many of these coupons having a long time to run, you can buy at a discount. It would not be, as counsel say, as if all this sum were due now. Much of this is only due along through future periods. I might make a few observations as to the manner in which the parties could get together and do right as between themselves. I think the honor of the state of Missouri will make her do as nearly right as possible, and if the parties complainant accept this opinion — and if they do not they can appeal after a final decree — I hope they and the respondent will be brought together so that the equitable principle which is involved in the act of 1855 (which I still think is in existence), that the state should be fully indemnified and these parties made to lose as little as possible, will govern the case. The motion for an injunction is overruled.

On final hearing the following additional opinion was delivered:

McCRARY, *Circuit Judge*.— By a series of legislative acts beginning with the act approved February 22, 1851, and end-

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ing with that of March 26, 1881, the state of Missouri aided with great liberality in the construction of a system of railroads in that state.

Among the enterprises thus largely assisted was the Hannibal & St. Joseph Railroad, for the construction of which the bonds of the state to the amount of \$3,000,000, bearing interest at the rate of six per cent. per annum, payable semi-annually, were issued. One-half of these bonds were issued under the act of 1851 and the remainder under the act of 1855. The bonds issued under the former act were to run twenty years and those under the latter act were to run thirty years. Some of the bonds have since been funded and renewed. Coupons for the interest on the entire \$3,000,000 were executed and made payable in New York. These acts contain numerous provisions intended to secure the state against loss and to require the railroad company to pay the interest and principal at maturity. Upon the hearing of the motion for a preliminary injunction in this case, the question of the true construction and effect of this legislation was fully considered, and the conclusion reached, as announced by Mr. Justice Miller, was, that it was made the duty of the railroad company to save and keep the state from all loss on account of said bonds and coupons. The treasury of the state was to be exonerated from any advance of money to meet either the principal or interest. The state contracted with the railroad company for complete indemnity. She was required to assign her statutory mortgage lien only upon paying into the treasury a sum equal to all indebtedness due or owing by said company to the state, and all liabilities incurred by the state by reason of having issued her bonds and loaned them to the company. The unpaid unmatured coupons constitute a liability of the state and a debt owing, though not due, and until these are provided for the state is not bound to assign her lien upon the road. Such was the view of the statutes taken by the court upon

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the former hearing and I am not disposed to depart from it.

Another question which was mooted at the former hearing, but not decided, is now, by the amended bill, presented for determination. It is this: What, if any, account is the state to render of the use of the \$3,000,000 paid into the treasury by the complainants on the twentieth day of June, 1881? Can she hold that large sum of money, refusing to make any account of it, and still insist upon full payment by the railroad company of all outstanding coupons?

Upon this subject Mr. Justice Miller, in the course of his opinion upon the former hearing, said: "I am of the opinion that the state, having accepted or got this money into her possession, is under a moral obligation (and I do not intend to commit anybody as to how far its legal obligation goes) to so use that money as, so far as possible, to protect the parties who have paid it against the loss of the interest which it might accumulate, and which would go to extinguish the interest on the state's obligations." In order to determine whether this obligation is one which may be enforced by a court of equity, it is necessary to consider the force and effect of the act of the general assembly of Missouri, approved March 26, 1881, and which is as follows:

An act to provide for the state sinking fund any surplus money that may be in the state treasury, not necessary to defray the current expenses of the state government, and to meet the appropriations made by law, and to authorize the fund commissioners to invest the same in the redemption or purchase of bonds of the state and bonds of the United States, Hannibal & St. Joseph Railroad bonds excepted.

Be it enacted by the general assembly of the state of Missouri, as follows:

SECTION 1. Whenever there is any money in the state treasury, not necessary to defray the expenses of the state government, and to meet the appropriations made by law, it shall be the duty of the state auditor, and he is hereby authorized and required to transfer the same to the credit of

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the state sinking fund, for the purpose of paying the state debt, or any portion thereof, and the interest thereon as it becomes due.

SECTION 2. Whenever there is sufficient money in the sinking fund to redeem or purchase one or more of the bonds of the state of Missouri, such sum is hereby appropriated for such purpose, and the fund commissioners shall immediately call in for payment a like amount of the option bonds of the state, known as "five-twenty bonds." Provided, that if there are no option bonds which can be called in for payment, they may invest such money in the purchase of any of the bonds of the state or bonds of the United States, the Hannibal & St. Joseph Railroad bonds excepted.

Approved March 29, 1881.

This act was passed in response to a special message of Governor Crittenden, dated February 25, 1881, in which he informed the legislature of the purpose of the Hannibal & St. Joseph Company to "discharge the full amount of what it claims is its present indebtedness to the state," and advised that provision be made for the "profitable disposal" of the sum when paid. It will be seen that the act not only authorized, but required the auditor to transfer the sum when received "to the credit of the state sinking fund for the purpose of paying the state debt, or any part thereof, and the interest thereon as it becomes due."

And it furthermore required the fund commissioners, whenever there should be in the sinking fund a sum sufficient to purchase one or more of the bonds of the state, immediately to call in for payment option bonds of the state known as "five-twenty bonds," provided that if no such bonds are subject to call, the money may be invested in the purchase of bonds of the state or bonds of the United States. The purpose of this enactment evidently was to enable the officials of the state to receive the \$3,000,000 and to immediately invest it in the securities named or some of them. Under the constitution of the state no money can be drawn from the

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treasury except in pursuance of an appropriation; and as it was foreseen that this sum might be received at a time when the legislature was not in session, the act made the necessary appropriation in advance. The legislature wisely determined that so large a sum should not be allowed to remain in the treasury for an indefinite period unused and earning no income. It is true that the act does not specifically mention the \$3,000,000 to be paid on account of the state aid bonds issued to the Hannibal & St. Joseph Railroad Company, but it clearly appears that it was passed with direct reference to that fund, and in response to the message of the governor asking that provision be made for its investment. The act was undoubtedly a part of the legislation relating to this loan, and if it did not enter into and become a part of the contract between the parties in interest, it was at all events binding upon the state, and the complainants had a right to rely upon and to pay their money to the treasurer upon the faith of it and with the expectation that it would be obeyed and executed. Can the state disregard it and still hold the railroad company bound for the unmatured interest to the same extent as if the \$3,000,000 had not been paid? That such a view of the rights and duties of the state would be in the last degree inequitable is too plain for argument. The state aid bonds have an average of about ten years to run, so that the interest to be provided for amounts to about \$1,800,000. The \$3,000,000 now in the state treasury, paid by complainants, will produce nearly the whole of this sum if the officers of the state will invest it in obedience to the positive requirements of the statute. By executing the law the state can save this large sum to complainants and still receive all that is due her. That she ought to do so upon principles of justice and equity, to say nothing of the binding force of the statute, is entirely clear. Interest is a sum paid for the use of money. It presupposes that the party paying the interest has the use of the principal. If the state is not bound to invest the \$3,000,000 and account for the profits of the invest-

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ment, it follows that the state has the principal sum and pays no interest, while the complainants pay interest for ten years upon \$3,000,000, the use of which is enjoyed by the state. To this it has been answered by counsel for the state:

1. That the statute imposes merely a duty upon the state auditor as between that officer and the state; and

2. That the \$3,000,000 was not paid with any agreement or understanding that it should be invested in accordance with the act of March, 1881.

In substance it is claimed, that, in so far as the rights of complainants are concerned, the state officers were at liberty to disregard the act. In this view I do not concur. Even if the terms of the statute were permissive only, and meant no more than the words generally employed in statutes imparting a grant of authority or power to a public officer to do a certain act, still it is well settled that all such acts are to be construed as mandatory whenever the public interest or *individual rights* call for the exercise of the power conferred. *Supervisors v. The United States*, 4 Wall. 435; *Galena v. Amy*, 5 Wall. 705; *McDougall v. Peterson*, 11 C. B. 755; Opinions Attorney General U. S. Vol. 15, p. 621.

But the terms of the act are clearly mandatory. The auditor is "authorized and *required*" to transfer the money to the credit of the sinking fund; and it is declared that upon such transfer "the fund commissioners *shall immediately* call in for payment a like amount of the option bonds of the state known as 'five-twenty bonds.'"

My conclusions upon the law of this case are:

1. That the payment by complainants into the treasury of the state of the sum of \$3,000,000 on the twentieth of June, 1881, did not satisfy the claim of the state in full, nor entitle complainants to an assignment of the state's statutory mortgage.

That the state was bound to invest the principal sum of \$3,000,000 so paid by complainants without unnecessary delay in the securities named in the act of March 26, 1881, or

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some of them, and so as to save to the state as large a sum as possible, which sum so saved would have constituted, as between the state and complainants, a credit *pro tanto* upon the unmatured coupons now in controversy.

3. That the rights and equities of the parties are to be determined upon the foregoing principles, and the state must stand charged with what would have been realized if the act of March, 1881, had been complied with. .

It only remains to consider what the rights of the parties are upon the principles here stated.

In order to save the state from loss on account of default of the railroad company, a further sum must be paid. In order to determine what that further sum is an accounting must be had. The question to be settled by the accounting is how much the state would have lost if the provisions of the act of March, 1881, had been complied with. The act provided for the investment of \$3,000,000, paid in by the complainants on the twentieth of June, 1881:

1. In the "five-twenty bonds" of the state as rapidly as they were subject to call.

2. Any portion of said sum that could not be invested in five-twenty option bonds because none were subject to call, was to be invested in bonds either of the state or of the United States.

I think a perfectly fair basis of settlement would be to hold the state liable for whatever could have been saved by the prompt execution of said act, by taking up such five-twenty option bonds of the state as were subject to call when the money was paid to the state, and investing the remainder of the fund in the bonds of the United States at the market rates. Upon this basis a calculation can be made, and the exact sum still to be paid by the complainants in order to fully indemnify and protect the state, can be ascertained. For the purpose of stating an account upon this basis, and of determining the sum to be paid by the complainants to the state, the cause will be referred to John K. Cravens, one of

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the masters of this court. The said master will examine and consider the proofs on file, and if necessary will take further testimony upon the subject of this reference, and will report to the next term of the court. In determining the time when the investment should have been made under the act of March, 1881, the master will allow a reasonable period from the time of the receipt of said sum of \$3,000,000 by the treasurer of the state, that is to say, such time as would have been required for that purpose had the officers charged with the duty of making said investment used reasonable diligence in its discharge.

The Hannibal & St. Joseph Railroad is advertised for sale for the amount of the installment of interest due January 1, 1882, which installment amounts to less than the sum which the company must pay in order to discharge its liability to the state upon the theory of this opinion.

The order will therefore be, that an injunction be granted to enjoin the sale of the road upon the payment of the said installment of interest due January 1, 1882, and if such payment is made, the master will take it into account in making the computation above mentioned.

John F. Dillon, Elihu Root, Wager Swayne and Geo. W. Easley, for complainants.

Glover & Shepley, Henderson & Shields and D. H. McIntyre, attorney general of Missouri, for respondents.

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GRAVELLE v. MINNEAPOLIS & ST. LOUIS R'Y Co.

(District of Minnesota.)

NEGLIGENCE.—Negligence is the failure to exercise that degree of caution which a man of ordinary intelligence would exercise under the circumstances of a particular case.

2. CONTRIBUTORY NEGLIGENCE — ACTION DEFEATED. — In cases of personal injuries inflicted by railroad cars in motion, where the plaintiff's negligence contributed to his injuries, he cannot recover.
3. INJURIES THROUGH NEGLIGENCE OF A FELLOW-SERVANT.—A railroad company is not liable for injuries inflicted on a person through the negligence of a fellow-servant of such person. Fellow-servants or co-servants, within this rule, are persons engaged in the same common service under the same general control. Where one servant is invested with control or superiority over another with respect to any particular part of the business, they are not, with respect to such business, fellow-servants within the meaning of the law.
4. EMPLOYER AND EMPLOYEE — CONTRACT — LEGAL IMPLICATIONS.—When a person enters into the service of another he assumes all the ordinary risks incident to the employment, and the employer agrees, by implication of law, not to subject the servant he employs to extraordinary or unusual perils or dangers, and that he will furnish the employee with reasonably safe and convenient machinery with which to perform his duties.
5. RAILROAD COMPANIES — PRESUMPTIONS AS TO EMPLOYEES AND MACHINERY.—The law presumes that railroad companies employ for their service persons of reasonable competency and fitness for their duties; and this presumption exists till the company is notified of their incompetency and unfitness. The same rule substantially applies to the question of the sufficiency of the machinery employed.

At law.

Action for damages for personal injuries sustained by an employee through alleged negligence of a railroad company.

C. K. Davis and *A. B. Jackson*, for plaintiff.

J. D. Springer, for defendant.

McCRARY, *Circuit Judge (charging jury)*.—The case which you are now called upon to consider, so far as the facts are concerned, is one in which Mr. Jeremiah Gravelle, the plaintiff, alleges that he has been injured in his person

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by the negligence of the defendant. You will see at a glance that the main question is one of negligence, and that question you are to consider in the light of what I shall say to you concerning the law.

The plaintiff claims that he was employed as a laborer in the yards of the defendant, the Minneapolis & St. Louis Railway Company, at Minneapolis; that while in their employment (I think it was some time in November, 1879) he was ordered by the assistant yard-master of the company (McCummings) to make a coupling between an engine and tender and a certain freight car standing upon one of the tracks in that yard. He claims that, under the circumstances of the case, this was a duty which was extraordinarily and unusually dangerous and hazardous, and that on account of the negligence of the assistant yard-master, in ordering him to make the coupling under the circumstances, and in failing to give an order or signal to check the speed of the approaching engine, he was injured without any fault or negligence on his own part. He also claims that the assistant yard-master, and the engineer who was in charge of the engine and tender, were negligent, unskillful, and unfit persons for their places, and that the defendant, the railroad company, had knowledge of the fact. He also claims that the machinery was not in proper condition, because the tender which he was required to couple to the freight car had no coupling link upon it. These are the facts upon which the plaintiff relies, and which he claims to have established before you.

On the part of the defendant it is claimed, in the first place, that its agents were not negligent; that the engine and tender were approaching the freight car at about the usual rate of speed, and not at an extraordinary or dangerous rate; that the duty which the plaintiff undertook to perform was not unusually hazardous or dangerous; and that there was no negligence on the part of the assistant yard-master in ordering him to do the duty under the circumstances, nor

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on the part of the engineer in running the engine up to the freight car. Defendant further claims that if there was negligence on the part of any of its individual agents, it was negligence of a fellow-servant employed in the same common service with the plaintiff, and that, therefore, the plaintiff cannot recover; the law being that the employer, the railroad company, is not liable for injuries which one of its servants may receive on account of the negligence of another fellow-servant employed in the same common service with the party injured.

As to the defect in the machinery by reason of the absence of the link from the tender, the defendant claims that that was not a defect; that it was not unusual to use tenders that had no links attached to them; that it was common to leave them inside the tender or lying upon the track to be picked up and used as occasion might require.

These are the issues upon which you have heard the testimony. It is your duty to consider the case impartially and carefully, and to reach your conclusion upon the questions of fact, and find a verdict in the light of the law as I shall now endeavor to explain it.

As I have already said, the controlling question is a question of negligence. I should have said to you, however, that another defense is that the plaintiff himself was guilty of negligence which contributed to his injury. Negligence is the failure to exercise that degree of caution which a man of ordinary intelligence would exercise under the circumstances of a particular case. The degree of care which is required of a man is measured by the circumstances by which he is surrounded, by the nature of the duties in the performance of which he is engaged. What would be ordinary care and prudence under one set of circumstances, might be negligence under another set of circumstances. As, for example, if a person is traveling along the public highway, with his own vehicle, at an ordinary rate of speed, and there are no unusual circumstances to excite caution or induce care, in that

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case a very slight degree of care may be considered sufficient; while, on the other hand, if he is engaged in coupling cars upon a railroad, where there are a great number of cars and engines, the very nature of his employment requires greater care and attention than would be required under other circumstances.

Your first inquiry, then, may be as to whether the plaintiff was guilty of any negligence or any want of ordinary care and prudence on the occasion of the accident. If you find that he was guilty of negligence which contributed to his injury, the law is that he cannot recover, and you will not be required to go any further with your investigations. But if you find him not guilty of contributory negligence, you will then proceed to consider the other points.

You must find that the accident and injury were not the result of the negligence of a fellow-servant engaged in the same common service with the plaintiff. And it is necessary for me to explain to you what is meant by the rule which I have stated. A fellow-servant or co-servant, within the meaning of this rule, is a person engaged in the same common service under the same general control of the party injured. I believe it is not contended in this case that there is any question but that the engineer upon the engine that was attached to the tender and the plaintiff were fellow-servants; so that the question, if you come to it, will be a question as to whether the accident was caused by the negligence of the assistant yard-master; for it is claimed that he was not a fellow-servant within the meaning of the rule which I have given you. But I will come to that presently.

After you have considered the question of contributory negligence, you will then inquire whether the coupling was done under the direction of the assistant yard-master, and in his presence, so that it was his duty to regulate the movements of the approaching engine. And here there is some conflict in the testimony, and a question of fact for you to decide.

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It is claimed by the plaintiff that the assistant yard-master, Mr. McCummings, was present and gave the order to do the coupling, and was there as the engine and tender approached the car, so that if it was coming at a rate of speed dangerously rapid he must have seen it, and it was his duty to have given a signal to check or slacken the speed. On the part of the defendant the claim is that McCummings gave a general order to the crew of which the plaintiff was one to make the coupling; that having given it he walked down the track and went off about his business in some other part of the yard, and that he was not present at the time the engine came down to be attached, so that he was not directing the coupling, and that it was not his duty under such circumstances to notice the rate of speed at which the engine was approaching, or give a signal to check the engine if it was approaching too fast.

Of course you will inquire whether the engine and tender did approach at an unusual rate of speed. If you find that it did not; that it came up at a usual rate of speed; and that everything was done in the usual way,—then there was no extraordinary peril, and no negligence on the part of the assistant yard-master, and no negligence on the part of the defendant, unless you find negligence on account of the absence of the link. But if you find that there was negligence in the manner in which the engine and tender were brought up to be coupled to the freight car, then you will consider this question: as to whether McCummings was there present, and giving directions as to the manner of coupling, so that it was his duty to see what was going on, and give directions to check the speed of the approaching engine. If you find that he was there, and giving directions, and that his attention was directed, or ought to have been directed, to the approaching engine, and that he failed to give the proper direction to check its speed, and if you find that it was negligence on his part which resulted in injury to the plaintiff without any fault on the part of the plaintiff, then you will

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come to this question which I have stated to you: whether McCummings, the assistant yard-master, was within this rule which I have stated,—that is, whether he was a fellow-servant engaged in the same common service with the plaintiff, or whether he was there in the place of the company. And you may be governed by the following rule: "Fellow-servants, within the meaning of the law, are such as are employed in the same service, and subject to the same general control. But if a railroad company sees fit to invest one of its servants with control or superior authority over another with respect to any particular part of its business, the two are not, with respect to such business, fellow-servants within the meaning of the law. One is, in such a case, subordinate to the other, and the superior stands in place of the corporation." So if you find, in your investigations, that the plaintiff was injured by the negligence of the assistant yard-master, then you will inquire whether the plaintiff was a subordinate with respect to the duties which he was then performing,—whether he was under the control and direction of the assistant yard-master, by the rules of the railroad company, in the performance of the duty which he was then performing. If so, I charge you as a matter of law that they were not fellow-servants within the meaning of the rule.

Now there is another question in the case upon which there is, perhaps, some conflict of testimony. It is alleged by the plaintiff that these two officials, the assistant yard-master and the engineer in charge of the engine and tender, were both negligent, incompetent, and unfit persons for the positions which they held, and that this was known to the defendant; and that it was guilty of negligence in employing them, or continuing to employ them; whereby the plaintiff has a right to complain that he was injured on account of that negligence. Upon that subject the law is, that when the plaintiff entered the service of the railroad company he assumed all the ordinary risks incident to the employment upon which he entered. He knew that he was

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entering upon a dangerous duty, and assumed all the risks ordinarily incident to its performance. On the other hand, the railroad company agreed, by the implication of the law, that they would not subject him to extraordinary or unusual perils or dangers; and, among other things, they agreed that they would employ for service with him persons of reasonable competency and fitness for their duties, and he had a right to expect that. The law presumes, however, that the railroad company, in employing its servants, exercised usual care and prudence, and if the plaintiff seeks to recover on the ground that it failed in that respect, it is incumbent upon him to prove, first, that these servants were incompetent and unfit persons; and second, that the railroad company had notice of that, either when it employed them, or at some time before the happening of this injury to the plaintiff. If there is no proof before you that the railroad company had any such notice; if at the time of employing these persons they had no reason to believe that they were incompetent,—then the plaintiff cannot recover upon the ground that the parties complained of were known to be incompetent and unfit persons.

The same rule substantially applies to the question of the sufficiency of the machinery. The railroad company agrees, when they employ a man to work for them, that they will furnish him with reasonable safe and convenient implements and machinery with which to perform his duties. If they fail in this, and the employee is injured on that account, and without fault of his own, they are liable. As I have said before, the only question here with regard to the machinery is whether the absence of the link from the tender is such a defect in the machinery as the plaintiff had no reason to apprehend; whether it was an unusual thing, and in consequence of it the plaintiff was subjected to extraordinary dangers and perils. If you find that it was not unusual to have the links left off the tender, then the plaintiff, of course, was bound to be advised of that fact, and cannot

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recover upon that ground. But if you find that it was the duty of the railroad company always to have the link on the tender, and that the failure to do that was to leave the machinery in an unusually dangerous condition, the fact would give the plaintiff the right to recover.

If you find for the plaintiff, you will come to the question of damages. This is a question very largely in your discretion, limited only by the duty which devolves upon you not to find excessive or unreasonable damages. You will, if you come to this question, have to consider the nature and extent and permanency of the plaintiff's injuries; his ability to earn a living since the receiving of the injury in question as compared with his ability before that time; his pain and suffering, both mental and physical. There is no testimony as to any expenses for surgeon's services here, and therefore you will not take them into consideration; but, upon all the testimony before you, if you find for the plaintiff, you will find in such a sum as you shall think reasonable and proper.

The case was subsequently heard upon motion for new trial and the following opinion delivered:

McCRARY, Circuit Judge.—The defendant complains that there was error in the charge of the court upon two points, to wit:

1. As to the effect of the absence of the link from the tender; and

2. As to the effect of the omission of the assistant yardmaster to signal the engineer to slow up when approaching the car to which the coupling was to be made.

Upon the first point the jury were charged to determine from the evidence whether the absence of the link from the tender was such a defect in the machinery as the plaintiff had no reason to apprehend; and whether its absence was an unusual thing; and whether, in consequence of it, the plaintiff was subjected to extraordinary dangers and peril. They were also charged as follows:

“If you find that it was not unusual to have links left off

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the tender, then the plaintiff, of course, was bound to be advised of that fact, and cannot recover upon that ground; but if you find that it was the duty of the railroad company always to have the link on the tender, and that the failure to do that was to leave the machinery in an unusually dangerous condition, the fact would give the plaintiff the right to recover."

It is suggested by counsel that the court erred in omitting from the charge a statement that the dangerous condition of the machinery caused by the absence of the link must have contributed to produce the injury, before the defendant would be liable. In this the counsel overlooks what was said by the court in charging the jury immediately in connection with the clause above quoted. The jury were told, in substance, that a railroad company is bound to furnish to its employees reasonably safe and convenient machinery with which to perform their duties; and the court added:

"If they fail in this, and the employee is injured on that account, and without fault of his own, they are liable."

Taking the whole charge together, I think the question was fairly submitted to the jury, whether the absence of the link rendered the machinery unsafe and dangerous, and whether the plaintiff was injured in consequence thereof.

It is further insisted that there was evidence tending to show that it was the duty of the crew of which plaintiff was one, to keep the tender and car supplied with links, and that if this was so, then the absence of the link was negligence of a fellow-servant. As I remember the testimony on the part of defendant, it tended to show that the defendant's custom was not to keep links attached to its tenders, but to leave them scattered about the yard, to be picked up and used by employees when required in coupling the tender to a car.

There was no evidence tending to show that the company made it the duty of any servant to attach the link to the tender before it was moved up for the purpose of making a coupling. It was insisted by the plaintiff, and there was

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testimony tending to support the contention, that it was negligence on the part of the company to manage its coupling operations in this way, and that question of fact was, I think, properly submitted to the jury.

The negligence, if there was any, in failing to affix the link to the tender was the negligence of the company and not of a fellow-servant of the plaintiff. It was the result of a custom in the yard which must be presumed to have been sanctioned by the company. It is suggested further that plaintiff did not allege in his petition, as an independent ground for recovery, that the machinery was defective on account of the absence of a link, or that the defendant was negligent in respect thereto, or had notice thereof.

The petition avers in general terms that the "plaintiff, without fault or negligence on his part, was hurt and injured in the manner hereinafter set forth, through the negligence, recklessness and unlawful acts and omissions of the defendant."

Whether, under such an allegation, any act of negligence or any fact constituting negligence not specifically set out in the petition, can be proved on trial, may be a question of some doubt. But it is not necessary to determine it upon this motion. Nor is it necessary to determine whether, upon a critical examination of the other allegations of the petition, it would appear with sufficient certainty that the plaintiff alleged the fact of the absence of the link from the tender as constituting negligence on the part of the defendant. It is sufficient for the purposes of this motion to say that these alleged variances between the allegations and the proof do not constitute a sufficient ground for granting a new trial.

The variance between the proof and the pleadings will seldom or never be ground for a new trial. *Graham & Waterman on New Trials*, Vol. 3, p. 970.

The reason for this rule is very apparent and is one of great public importance. The parties are presumed to know what

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the record contains. If on the trial evidence be offered which is not pertinent to the issue joined, it is the duty of the party against whom such evidence is offered to object then and there. If the objection be well founded, the court may in furtherance of justice permit an amendment of the pleading, so as to allow the evidence to be offered upon such terms as may be reasonable and just. I do not, of course, say that a verdict can be upheld where the proof goes to establish a cause of action altogether different from that set forth in the record; but I am clearly of the opinion that in a case like the present, where there is clearly an allegation of negligence by the defendant, and of injury to the plaintiff resulting therefrom, and the question raised for the first time upon a motion for a new trial is simply as to whether that allegation is sufficiently definite and specific, the court must hold that the objection comes too late.

The defendant claims that the court erred in charging the jury as a matter of law, that if the assistant yard-master was present giving directions as to the manner of making the coupling, it was his duty to know if the engine was approaching at a dangerous rate of speed and to give directions to check it.

It is insisted that the court took upon itself the responsibility of deciding the question of negligence. The counsel labors under a misapprehension. From an examination of the charge it will be seen that the court assumed the existence of no particular facts, but stated fully and plainly the claims of the respective parties.

With respect to the duty devolving upon McCummings, the assistant yard-master, if he was present, and if the plaintiff was acting under his directions, the court said to the jury:

“If you find that he was there giving directions, and that his attention was directed, or ought to have been directed, to the approaching engine, and that he failed to give the proper direction to check its speed, and if you find that this was negligence on his part which resulted in injury to the plaintiff

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without any fault on the part of the plaintiff, then you will come to the question which I have stated to you, whether Mr. McCummings, the assistant yard-master, was within the rule which I have stated, that is, whether he was a fellow-servant engaged in the same common service with plaintiff, or whether he was there in the place of the company."

By this language the court submitted to the jury simply the question whether, as a matter of fact under the evidence, McCummings was guilty of negligence, leaving for subsequent consideration by the jury, the question whether the plaintiff was entitled to recover by reason of such negligence on the part of McCummings; or in other words, the question whether the plaintiff and McCummings were fellow-servants in the same common employment. There was, therefore, no error in this part of the charge.

This brings us to an important question discussed by counsel both on the trial of the case and on this motion, which is this: Can a railroad company be held liable to one of its employees for injuries resulting from the negligence of another, in a case where the former has been placed by the company under the control and direction of the latter, and has been injured by reason of the latter's negligence and while executing his orders? Upon this subject the rule given in the charge is as follows:

"Fellow-servants, within the meaning of the law, are such as are employed in the same service and subject to the same general control. But if a railroad company sees fit to invest one of its servants with control or superior authority over another with respect to any particular part of its business, the two are not, with respect to such business, fellow-servants within the meaning of the law. One is in such a case subordinate to the other, and the superior stands in the place of the corporation."

I am aware that the authorities upon this subject are not uniform, but I have considered it maturely in this case, as well as in some others which have been tried in this court,

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and I am content, without going now into any discussion of the question, to adhere to the rule as above laid down. I think the conclusion I have reached is well supported by reason, by considerations of public policy, and by the following authorities: *R. R. Co. v. Fort*, 17 Wall. 557; *Wood's Master and Servant*, secs. 390, 436, 438, 439; *Cooley on Torts*, 555; 2 *Thompson on Neg.* 976; *Stoddard v. St. L. R. R. Co.* 65 Mo. 514; *Hough v. R. R. Co.* 100 U. S. 213; *Ross v. R. R. Co.* 2 McCrary; *R'y Co. v. Bayfield*, 37 Mich. 205; *Thompson v. Herman*, 47 Wis. 602; *Flike v. R. R. Co.* 53 N. Y. 553; *Corcoran v. Holbrook*, 59 N. Y. 517; *Shulz v. R. R. Co.* 48 Wis. 375.

The motion for new trial must be overruled, and it is so ordered.

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(*Eastern District of Missouri. March, 1882.*)

1. COURTS — JURISDICTION — BANKRUPTCY.— Where the jurisdiction of a United States district court over a cause depends upon the fact that one of the plaintiffs is the assignee of a bankrupt whose estate is interested in the controversy, the court will cease to have jurisdiction if the interest of the estate ceases, and the cause is dismissed as to the assignee.

Motion to dismiss for want of jurisdiction.

The parties to the original bill in this case were James C. Moore and James E. Yeatman, as assignees in bankruptcy of J. O'Fallon and Samuel Hatch, and George W. Hall, Peleg Hall, and Robert Aull, trustees of Hall & Hall, plaintiffs, and John O'Fallon, James O'Fallon, and Anna M. O'Fallon, defendants. The case was dismissed by a supplemental bill as to the assignees of O'Fallon & Hatch. The other material facts are sufficiently stated in the opinion of the court.

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Given Campbell, James Taussig and George W. Taussig,
for plaintiffs.

E. F. Farrish, for defendants.

TREAT, *District Judge*.—Many questions are presented worthy of serious discussion, jurisdictional and otherwise. If the court, despite the shifting aspect of the case, retains jurisdiction for the purpose of ascertaining what the present plaintiffs would be, under any circumstances, entitled to as damages for waste, this would involve many difficulties. They became purchasers July 17, 1784, and bought the property as it then stood. They certainly cannot go back of the date of the assignment to them of the original mortgage, and have the court inquire as to the prior license granted by the mortgagee to clear the land, and of what was done under that license unrevoked subsequent to the assignment. By this it is meant that the assignees would stand in the same position as their assignor, so far as the subsisting mortgage of the realty and the license granted was concerned, but no further. As such assignees they had a demand against James J. O'Fallon, the bankrupt, who was the indorser of the mortgage note, and were compelled to realize on their security, or ascertain its value, before they could prove up against the general estate in bankruptcy of James J. O'Fallon for the balance remaining. Having become purchasers of the mortgaged property, thus ascertaining its value, they appear before this court solely in that capacity, if they have now any right to proceed here. As purchasers they acquired the property as it was, stripped by waste if you will, previous to their purchase. They did not thereby acquire the right to damages for previous waste, unless it passed by joint sale; for that right belonged solely to the bankrupt's assignee, and would be assets of the bankrupt's estate, or would be so much added to the value of the security. Dates are confused, leaving the facts to be settled as best they may under the evidence. The latest

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date for cutting timber on the Huskey tract is in July, 1874; but whether such cutting was before or after the plaintiffs became purchasers, there is nothing to show with definiteness.

Without going through by way of detailed analysis the large amount of evidence offered, the court holds that the plaintiffs, in the present aspect of the case, could not recover damages for any waste done prior to their purchase, July 17, 1874, and there is no proof satisfactorily shown of any waste subsequent to that date for which the defendant is responsible.

To make this ruling more intelligible, a full history of the case ought to be given: The salient points are that James J. O'Fallon was the mortgagee of the estate of the defendant; that as such mortgagee he licensed his mortgagor to proceed with the improvements of the mortgaged premises, which consisted mostly of wild land; that the mortgagor thereupon cleared many acres, felling timber, etc., and also improving the residence building; that James J. O'Fallon, the mortgagee, to secure some of his partnership indebtedness, assigned the mortgage to the plaintiffs (partnership creditors); that the partnership went into bankruptcy, together with James J., the partner; that thereupon, in the course of the administration of the bankrupt estate, it became necessary for the assignees in bankruptcy, and of these plaintiffs, holding the original mortgage, to institute proceedings to prevent waste, whereby the security would otherwise be diminished in value, and the plaintiffs have a large demand against the bankrupt's general estate. The security was sold, and these plaintiffs became the purchasers. What did they buy? The property as it then was, diminished by whatever waste had been previously committed? As purchasers they acquired no right of action as to waste previously committed, unless the same is covered by the sale. If such waste had been committed, whose was the right to recover therefor? If that right belonged to these plaintiffs, as assignees of the mortgage, they should have enforced the same, and accounted therefor

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in the settlement of the bankrupt estate. If they did not so account, the assignees in bankruptcy were entitled to the amount, to be divided among the general creditors. Certainly these plaintiffs, as assignees of a mortgage, could not, on becoming purchasers at the mortgage sale, be entitled to become creditors for the deficiency, and also for waste, in consequence of which they bought the property for a diminished sum. To make this more clear, let it be supposed that a stranger, on July 17, 1874, bought the property and received a deed therefor. He bought the property as it then stood, and not a right of action as to antecedent waste. Could he, because he was not only purchaser but mortgage creditor, acquire any rights other than what any other purchaser would secure? If so, to whom belonged the damages for antecedent waste? If to the assignee of the mortgage, was it not his duty to prove the same as an independent demand against the general estate, or, as in this case, for the bankrupts' assignees to recover the same as general assets?

In any view of the case which may be presented, it seems that the conclusion announced is the only tenable one.

But there is a motion pending and reserved, viz., to dismiss for want of jurisdiction. Plaintiffs' right to appear in this court depended mainly on the joinder of the assignees in bankruptcy, who were supposed to have some interest in the controversy. When the latter disappeared from the suit, what was the controversy? It was one between the mortgagor and the assignee of the mortgage, who had become purchaser under foreclosure. The bankrupt estate had no longer any interest therein, and consequently this court no jurisdiction. Hence, whether the motion to dismiss for want of jurisdiction obtains, or the court is to pass on the merits, the same result follows. On the merits the plaintiffs cannot prevail; but as the court has no jurisdiction it cannot pass on the merits.

The motion to dismiss will be sustained.

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HIBERNIA INS. CO. v. ST. LOUIS & NEW ORLEANS TRANSP. CO.

(*Eastern District of Missouri. March, 1882.*)

1. CORPORATIONS — FRAUDULENT ASSIGNMENT OF ASSETS — SUBROGATION — PLEADINGS — PARTIES.— Where one corporation, after contracting debts, fraudulently transfers to another corporation all of its property, the latter having notice of the indebtedness, *held*, that a suit in equity to obtain decree for a moneyed judgment against the latter may be maintained by a creditor of the former without first obtaining judgment at law. *Held* further, that the president of the former corporation who caused the transfer to be made was not a proper party.

Demurrer to the bill.

The defendants demurred to the bill in this case upon the following grounds, viz.:

(1) Because it contains no matter of equity whereon this court can ground any decree, or give complainant any relief as against defendants. (2) Because said bill does not show any privity between the plaintiff and defendants which would entitle it to call upon these defendants to account to it in this court. (3) Because said bill of complainant is multifarious, in that it unites in the same bill several matters and causes in which none of these defendants have any united or common interest, and in which no two of said defendants have any interest. (4) Because, on the face of said bill, it is apparent that this complainant has no right to institute this suit in this court, or to ask the relief requested.

The averments of the bill are sufficiently set forth in the opinion of the court. The parties defendant are the St. Louis & New Orleans Transportation Company, the Babbage Transportation Company, and Samuel Lowery.

O. B. Sansum and Geo. H. Shields, for plaintiff.

Given Campbell and Thomas J. Portis, for defendants.

TREAT, *District Judge*.— The Babbage Transportation Company, by different contracts of affreightment with different

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shippers, undertook to transport to New Orleans certain merchandise specified. Said merchandise was shipped at different times on different barges, which were towed by different steamers. It is averred that the same, respectively, was damaged or lost through the negligence of said transportation company, under entirely different circumstances. There is no averment that judgment *in rem* or *in personam* was ever in admiralty or at common law had, but that the plaintiff, as insurer, paid the amount of the respective losses, and, being thereby subrogated to the rights of the respective shippers, can maintain the cause in equity before recovery had on the original demands. The bill avers that, after said cause of action accrued against the Babbage Transportation Company, said company transferred fraudulently to the other defendant company all of its boats, barges, etc., and that Lowery, being president and principal stockholder, caused said transfer to be made. The prayer of the bill is for a decree as for a moneyed judgment against the defendants; also to charge the property transferred as aforesaid with a lien in plaintiff's favor therefor, and for an injunction *pendente lite* against the further sale or transfer of said property.

It is obvious that if this mode of proceeding can be upheld the court will have primarily to ascertain whether the Babbage Company, as owner of the respective barges or steamers, was liable for the alleged losses. In admiralty, if a loss occurred as charged, the shippers had their appropriate remedy *in rem* or *in personam*, with a resultant lien *in rem* on the barges and steamers involved, or, at common law, actions on the different contracts of affreightment. The rights of the shippers would pass to the insurers by subrogation. No such legal proceedings, however, have been had. The plaintiff is merely a creditor at large as to two separate demands, requiring distinct trials. Of course two such demands could not be united in an action *in rem* in admiralty, because the transactions and the vessels were different. Whether they could be united *in personam* it is not necessary to discuss, but

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in equity such joinders are frequent. The right to join the two demands must rest, then, upon the allegations as to the fraudulent transfers, the same having been made with knowledge of the plaintiff's claims, and impliedly to defeat the same.

By what rule was that property or the vendee thereof charged with the unascertained obligations of the vendor? It must be, if at all, because said transfer was a mere fraudulent scheme to deprive the plaintiff of his rights against said property. But he had no distinctive right against any other than the guilty *res* respectively; certainly no lien upon *all* the property of the owners prior to a judgment *in personam* in admiralty, or upon execution levied subsequent to judgment at common law. It is true that under exceptional circumstances courts of equity have lent their aid to creditors at large, and generally when the property sought to be charged was already in the custody of the court by force of a trust, receivership, etc.

The case of *Garrison v. Memphis Ins. Co.* 19 How. 312, can hardly be considered as fully sustaining the plaintiff's proposition, although, from the imperfect statement of that case, it would seem to be held that because an insurer is in equity subrogated to the rights of the insured, he may before judgment at law proceed to enforce his demand against the owners of a vessel. The cases cited in that opinion do not go to the length here claimed; for the court only insists upon the rule whereby the insurer, subrogated to the rights of the insured, may enforce the lien on a judgment recovered by the insured, and "may apply to equity whenever an impediment exists to the exercise of his legal remedy in the name of the assured." To those familiar with the common-law practice then prevailing to a large extent, the true meaning of that expression by the court is clear. In that case there were eleven contracts of affreightment dependent on the construction each was to receive — the disaster being one and the same — and, to avoid multiplicity of suits, embraced in one bill.

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In *Case v. Beauregard*, 99 U. S. 119; S. C. 101 U. S. 688, a fuller exposition of equitable principles is given. The same case was twice before the United States supreme court, substantially, and the views expressed in 101 U. S. 688, are especially instructive. The first bill was dismissed because, as the court says, "it was not averred that judgment at law had ever been recovered against the partnership for the debt, and that an execution had been issued thereon and returned fruitless." It then proceeds to state under what circumstances a creditor may, without judgment and execution previously had, pursue his demand in equity. Taking the most liberal of the rules stated in that case as exceptions to the general proposition, the case before the court will not fall strictly within any of them; for each must be considered in the light of the equitable circumstances upon which it depends.

It must be admitted that some of the views expressed in that opinion go very far towards sustaining the plaintiff's proposition, yet cannot be held to go expressly to the extent here claimed, as covering claims at large not dependent on the same testimony or transactions. The plaintiff's demands by subrogation are for two distinct causes of action against the Babbage Transportation Company. It is charged that Lowery was president and principal stockholder of said company. As such officer and stockholder no cause of action existed against him personally. Why, then, should he be made a party defendant to this suit? It is said that by force of the Missouri statute he could in given contingencies be compelled to respond, to a certain extent at least, to the demands against the corporation. But is this a proceeding to enforce a supposed liability against him as a stockholder? and, if so, why is not the same done pursuant to the Missouri statute, so that he may be compelled to respond individually to plaintiff's demand? But the bill is based on another theory to which he is not a necessary or proper party; otherwise a decree would have to be rendered against him individually.

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He is not charged with insolvency; nor are any of the facts averred whereby he would become personally liable for the debts of the Babbage Transportation Company. If he were, the proceedings at law against him would be full and adequate under the Missouri statute. The extended theory of the bill is that there are outstanding demands against the Babbage Transportation Company not reduced to judgment nor supported by a lien; that in that condition of affairs that company transferred all its property, without consideration, and therefore fraudulently, as against existing creditors, to the other corporation, with full knowledge on the part of the latter that there were such outstanding demands; that the only means of enforcing those demands is to compel the latter company to hold the property thus received by it subject to such demands when established. The peculiarities of the law concerning the formation and dissolution of corporations under the Missouri statutes provoked a sharp comment from Justice Miller a few years ago, so far as they were designed to affect proceedings in admiralty. His remarks might have been properly extended to other proceedings. The case before the court is illustrative. A corporation having incurred liabilities is dissolved, practically, by transferring all its property to another corporation, formed possibly for the very purpose of leaving the creditors of the former (creditors at large) without any adequate means of realizing their just dues. There is too much of this, as judicial experience has shown. The change of organization is too often a mere change of name, designed solely to defeat the rights of creditors. The corporation has one name to-day, and to escape its liabilities goes through the form of a new organization and takes a new corporate name, with a transfer of all the assets of the old corporation. Should that contrivance succeed? Should not a court of equity hold the new answerable for the old to the extent of assets received? Such is the purpose of this bill. Mr. Lowery is an unnecessary party, but the allegations are sufficient to hold both of the corporations

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to answer. If the new corporation knew, as charged, that the demands against the old were outstanding, and with that knowledge received all the property of the old corporation without consideration, why should it not be held to have acquired that property *cum onere*? Will not a court of equity cut through such formal contrivances, so as to prevent the success of a scheme which operates a fraud, whether so intended or not? Such seems to be the scope of the decisions by the United States supreme court.

There may be many difficulties connected with the transfer of personal property, if such a view is to obtain, which difficulties, however, do not arise in this case. Here it is charged that the new corporation took all the property of the old without consideration, charged with full notice of plaintiff's demands, and therefore, as to this plaintiff, fraudulently. It may be that serious embarrassments will ensue, pending the litigation, if the *lis pendens* is to hang over the new corporation concerning its rights in the transferred property. Of course it is answerable to plaintiff's demands only to the extent of the property received; and if any serious detriment as to the use or disposal of the same should arise, the court is open for such orders as may preserve the rights of the parties pending the litigation.

The attention of the court has been called to the Missouri statute, whose terms and procedure, it is considered, are inapplicable to the matters under consideration. The averments of the bill are sufficient, so far as the two corporations are concerned, but not sufficient as to Lowery. If any cause of action against him, personally, should arise, either through his connection with the respective corporations or otherwise, the plaintiff can then pursue whatever course at law or in equity may be proper; but such possibilities cannot justify the plaintiff in making him, or any other stockholder, a party defendant to the present proceeding.

The court decides that said Lowery is improperly joined as a defendant; and the demurrer will, to that extent, be sus-

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tained, and overruled in all other respects. The plaintiff can dismiss as to Lowery; and, on doing so, the remaining defendants will have leave to answer within fifteen days.

The doctrine as to multifariousness in this class of cases is well considered in *Hayes v. Dayton*, 18 Blatchf. 420.

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HARRIS v. SAME.

MEIGHEN v. SAME.

(*District of Iowa, 1882.*)

1. PRACTICE — PRODUCTION OF BOOKS, ETC.— In requiring the production of books or writings in evidence in actions at law, federal courts are not governed by the provisions of state statutes, but by the provisions of section 724, R. S.
2. SAME — DISCRETION OF COURT.— In introducing the production of books, etc., in evidence, the court will exercise its discretion, following the practice, in such cases, in chancery.

At law.

LOVE, *District Judge*.— We are not governed, as counsel seem to suppose, by the provisions of the Iowa code in determining this motion, but by the following provisions of the act of congress:

Section 724, R. S. "Power to order production of books and writings in actions at law."

"In the trial of actions at law the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power which contain evidence pertinent to the issue, in cases under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings in chancery.

"If a plaintiff fails to comply with such order, the court

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may, on motion, give the like judgment for defendants as in cases of nonsuit; and if a defendant fails to comply with such order the court may, on motion, give judgment against him by default."

From this provision it is clear that the plaintiff's motion cannot be denied. But how, when and where the books, etc., shall be produced must be determined by the sound and just discretion of the court. To order the books of a corporation, or any great business firm, to be brought from a distant place, where they may be constantly needed, to the place where the court is held, would be a practice in the highest degree inconvenient; neither would the court order the books of a firm or corporation to be taken from the possession of the owners, and placed in the custody of any person not interested in their safety and preservation. The right of a litigating party is to inspect, to examine, and take copies, with view of securing information, and offering their contents in evidence. This right the law secures to him, and the court will order it to be done in such a way as to prejudice as little as possible the owners of the books. The owner of books in which he has kept his accounts, and which he may need for daily and hourly use, is just as much entitled to their custody as he is entitled to the possession and use of any other personal property. It would be most prejudicial and unjust to order a litigant to bring his books from a distant place, where they are in constant use, and deliver them to some officer of the court for the convenience of an adversary party. If such were the rule, a foreign insurance company or railroad corporation or private firm might be compelled, under penalties of contempt and default, to bring their books from far distant states, and even from beyond the seas, at their own expense, and to their grievous prejudice, for the use, benefit and convenience of their adversaries. It will be seen, by examining the foregoing provision, that the court is to govern its discretion by the practice in such cases in chancery. The practice in equity

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has been long established, and the court will make an order in strict pursuance of that practice.

As to means by which the order shall be enforced, the rule quoted above speaks for itself. But, even in the absence of such a rule, the court would find a way to enforce obedience to its orders by a party litigant before it.

ORDER.

Let the plaintiff, his solicitors and agents, be at liberty, at all seasonable times, upon giving reasonable notice, to inspect and peruse at the office of the defendant company, or elsewhere, the books, papers and vouchers referred to in the plaintiff's application as containing evidence pertinent to this case, the same being in the defendant's possession, custody or power, and take copies thereof and abstracts therefrom, as they shall be advised, at the plaintiff's expense; and let the said defendants produce any designated books, papers or vouchers before any competent officer taking depositions, on due notice, at the plaintiff's instance, at the town, or city, or place where said books, papers or vouchers may be kept in custody, in order that any copies, abstracts or extracts taken under this order may be compared, verified and proved, so as to be offered in evidence.

It is further ordered that, in order to entitle himself to have such books, papers and vouchers produced before such examining officer, the plaintiff shall designate the books, papers or vouchers required, and give reasonable notice of the time and place when and where the same shall be produced.

See *Geyger v. Geyger*, 2 Dall. 332; *Thompson v. Selden*, 20 How. 194; *Maye v. Carberry*, 2 Cranch C. C. 336; *Bank of U. S. v. Kurtz*, id. 342; *Hilton v. Brown*, 1 Wash. C. C. 298; *Bas v. Steele*, 3 id. 381; *Dunham v. Riley*, 4 id. 126; *Vasse v. Mifflin*, id. 519; *Jaques v. Collins*, 2 Blatchf. 23; *Iasigi v. Brown*, 4 Curt. 401.

The United States v. Snyder and another.

THE UNITED STATES v. SNYDER and another.

(*District of Minnesota. September, 1881.*)

1. **CRIMINAL LAW — FALSE RETURNS BY POSTMASTERS — ACCESSORIES — ACT OF JUNE 30, 1879.**— One who aids and abets a postmaster in committing the offense provided against by the provisions of the act of June 30, 1879, which declares that a postmaster making a false return shall be deemed guilty of a misdemeanor, etc., is guilty of the same offense, and liable to the same punishment, as his principal.

NELSON, *District Judge*.—The prisoners, Snyder and Bertram, were arrested on complaint charging “That Snyder and Bertram, the said Snyder being postmaster, did unlawfully and knowingly make to the auditor of the United States, for the postoffice, in said Snyder’s name, a false return, for the purpose of fraudulently increasing his compensation as such postmaster, under the provisions of the act of June 30, 1879.”

The act referred to declares “that the postmaster making a false return shall be deemed guilty of a misdemeanor, and, on conviction, punished,” etc.

An application is made for the discharge of Bertram, who, it is admitted, is not a postmaster. He was arrested as an aider of the postmaster in the commission of the offense.

The defendant’s counsel insist that no person but the postmaster can commit the act made criminal by the statute, and be punished under it. The general doctrine, that in misdemeanors all connected with the offense are principals, is conceded; but it is urged that the policy of congress in respect to the postal system, as shown by the numerous laws creating offenses, would limit this one and the punishment affixed in this statute to the postmaster. I cannot assent to this view of the law. The act of the postmaster being declared a misdemeanor, it was evidently the intention of congress to make it so for all purposes.

An employee of the postmaster, or a person not connected with the office, has no right to procure or aid in the commis-

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sion of this offense, and it is not reasonable to suppose congress intended to change the general principle of the law. If it had been enacted that the postmaster who made a false return should be guilty of a felony, the new felony created by the statute has all the incidents it would have at common law, and an accessory before the fact could be punished, though the act be silent as to accessories. Why not the procurer and aider here? The argument that the abettor and aider should escape the punishment affixed on the statute which declares the act a misdemeanor, does not commend itself to my judgment. See authorities cited in 4 Dill. 410; also, Russ. Crimes.

The prisoner is remanded. Bail fixed.

W. W. Billson, U. S. Attorney, for the United States.

C. D. O'Brien, for defendant Bertram.

DUNCAN v. GREENWALT.

(*Eastern District of Missouri. March, 1882.*)

1. COURTS OF EQUITY — JURISDICTION — PRACTICE — STATUTORY ACTIONS.— Where the statutes of a state, in which the distinction between actions in chancery and suits at law is abolished, provide for a particular action, the question whether a federal court held in that state should regard that action, when brought before it, as legal or equitable, must depend upon the facts stated and the relief sought. If the suit appears to be in the nature of a suit in equity, it should go upon the equity calendar, and be proceeded with in accordance with the equity rules.
2. SAME — SAME — ACTION TO QUIET TITLE.— Courts of equity have jurisdiction over suits to quiet the title to real estate.

In equity.

This is a bill in equity filed by the complainant to quiet the title to certain real estate, situated in the city of St. Louis, by removing a cloud therefrom, caused, as is alleged,

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by the execution to the defendant's grantor of a certain tax deed. It is alleged that the pretended tax sale, and the deed executed in pursuance thereof, were void because of the failure to comply with the provisions of the statute of Missouri concerning tax sales. The respondent demurs to the bill upon the ground that under certain statutes of Missouri the complainant has a plain, speedy and adequate remedy at law.

E. Cunningham, Jr., for complainant.

E. R. Monk, for respondent.

McCRAEY, *Circuit Judge (orally)*.—The bill as it now stands is plainly a bill to quiet title to the real estate in controversy by removing a cloud therefrom, and it is properly brought upon the equity side of the court, in accordance with long-established rules, unless it be true, as claimed by counsel for the respondent, that a plain, speedy and adequate remedy at law is provided by certain statutes of Missouri. The first of these is section 6852 of the Revised Statutes of Missouri, which provides as follows:

“Any person hereafter putting a tax deed on record in the proper county shall be deemed to have set up such a title to the land described therein as shall enable the party claiming to own the same land to maintain an action for the recovery of the possession thereof against the grantee in deed, or any person claiming under him, whether such grantee or person is in actual possession of the land or not.”

Counsel for the respondent is in error in insisting that a remedy given by statute is necessarily a remedy at law. The code of Missouri, like the codes of many other states, abolishes the distinction between actions in chancery and suits at law, and provides for the mingling the two in the same proceeding. The statute, therefore, provides both for equitable and legal proceedings. And when the statute provides, as in the section just quoted, for a particular action, the question whether that action is to be regarded in this court as equi-

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table or legal must depend upon the facts stated and the nature of the relief sought. Although authorized by the code it may be an equitable action. It is insisted that this section provides for a suit by a party in possession. If it has that meaning it is certainly an anomaly in the way of legislation, for in the very nature of things a suit to recover possession of real estate cannot be maintained by a party who already has possession. The statute, however, does not provide that a suit for possession may be brought by a party who already has the possession; it provides that such a suit may be brought against the grantee in a tax deed, or his assignee, whether such grantee or assignee is in possession of the land or not. It may apply to a case where the land is not occupied in fact. But, even if construed to apply to such a case as the present one, I do not think it provides for an exclusive remedy at law.

In the state courts it might be held that a proceeding instituted under this section would afford the complainant an ample remedy, because either an equitable or legal action might be brought thereunder. But when such an action comes into this court, we are bound by the equity practice which prevails here to look into the case, and if it appears to be in its nature a suit in equity, it must go upon our equity calendar, and be proceeded with in accordance with the equity rules. The section, therefore, does not provide for all actions a remedy at law, nor can I say that it prescribes such a remedy in the present case, since the bill shows upon its face a case in equity.

The other statutory provision relied upon by the respondent is section 3561 of the Revised Statutes of Missouri, which provides in substance that a party in possession of real estate may bring action against a party out of possession, who claims title, to require him to commence his suit at law to settle the question of his rights. It has been expressly held by the supreme court of Missouri that this section does not give an exclusive remedy at law so as to oust

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the jurisdiction of a court of equity in a case brought to remove a cloud from the title. *Harrington v. Utterback*, 57 Mo. 519.

If the respondent, however, thinks that the question of title in this case can be and should be determined in a court of law, where there can be a trial by jury, she is at liberty to institute such a suit, which she can do at any time, the complainant being in possession. The fact that a bill in chancery has been filed does not estop respondent from commencing an action at law. If such an action be commenced the court will then determine whether the suit in equity should be stayed until after a trial in the action at law.

The demurrer to the bill is overruled.

TREAT, *District Judge*, concurs.

UNITED STATES v. KRUM, Adm'r, and others.

(*Eastern District of Missouri. March, 1882.*)

1. **INTERNAL REVENUE LAW — COLLECTOR — PAYING MONEY UNDER DECREE OF COURT.**— Where a decree of forfeiture is rendered in a suit for a breach of the internal revenue law, and the defendant, pursuant to a compromise with the government, pays a sum of money into court, and A. and B. are adjudged entitled to a portion of the fund paid as informers, and the court makes a final order of distribution, and issues checks to C., collector of internal revenue of the district, and no appeal is taken, and C. pays A. and B. the amounts to which they have been held entitled, he cannot be held liable on his official bond for the amounts so paid, whether the informers are legally entitled thereto or not.
2. **SAME — INFORMER.**— Where money is paid into court under circumstances like those above stated, the right of the informers to their proportion of the sum paid is not affected by the fact that a part of such sum is designated to cover taxes.

TREAT, *District Judge*.— This is a suit on the official bond of the late Charles W. Ford, formerly collector of internal

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revenue, to recover three several sums of money alleged to have been received by him, and to be due to the United States.

It appears that three several suits *in rem* were instituted by the United States, in the United States district court, for the forfeiture of certain distilled spirits, and such proceedings therein had as resulted in decrees of forfeiture. Pursuant to the terms of compromise, the sum of money required was paid into the registry of the court. In two of the cases the court had adjudged Able and Hunter, respectively, to be informers, and consequently entitled, under the law and regulations then existing, to portions of the proceeds recovered. Final orders of distribution were made, and checks issued to the collector accordingly. He paid to the informers their respective shares, under the circumstances stated, and the sums by him so paid are two of those now sued for.

At a term of the district court subsequent to that in which it had finally disposed of those cases, application was made by the collector, at the instance of the commissioner, for leave to pay back into the registry the sums received, with a view to securing different or modified decrees. The court held that it could not thus change the final decrees entered of a former term.

It seems that the sum fixed upon for compromise was based partly on penalties and partly on taxes due; and therefore the commissioner was of opinion that the informers should receive nothing from that part of the gross sum paid, which was designed to cover taxes. The court, in its action, treated the fund in the registry as so much recovered from the forfeitures named. The suits were not for taxes, and what might or might not have induced the compromise could not alter the law or the *status* of the cases. The money was paid in those suits, and must be distributed as the law in such cases required. As had been well settled, the informers could not be deprived of their portions of the proceeds.

This suit is based, not only on a different theory, but also

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on the hypothesis that those final decrees made in 1870, of the district court, furnish no protection to the collector who acted under them. This court holds otherwise. The decrees of the district court were subject to review by the appellate court; but no action therefor was ever had. Hence there can be no recovery by the United States for the sums so paid to the informers.

As to the third sum in dispute there is no valid defense, to wit, \$2,710.80; but it is entitled to a credit of \$582.44.

Judgment, therefore, will be for \$2,127.36, with interest at the rate of six per cent. per year from the date of the demand on the administrator, to wit, December 13, 1878.

William A. Bliss, for the United States.

William Patrick, for defendants.

CAVENDER v. CAVENDER.

(*Eastern District of Missouri. February, 1882.*)

1. COSTS — CLERK'S FEES.— The clerk may collect his costs as they accrue, irrespective of the final result.
2. SAME.— A transcript of a record on appeal, or writ of error, is only a copy, and the clerk can charge therefor only ten cents per folio.
3. SAME — EXPENSES.— For binding or express charges the clerk may charge the reasonable, actual cost to him.
4. SAME.— The clerk cannot tax costs for drawing a bond and its approval when it was drawn by counsel and approved by the court.
5. SAME — FOLIO, WHAT.— An original entry, distinct from all others, though less than a folio (one hundred words), is to be charged as a full folio. Appellant must pay costs incident to his appeal.

Motion to retax clerk's costs for a transcript, on appeal to the supreme court. The clerk had collected fifteen cents per folio for a transcript, and a like rate for an appeal bond drawn by the attorneys, and also a fee for approval of the bond in open court by the judges.

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Lucien Eaton, for the motion.

M. M. Price, clerk, *pro se*.

TREAT, *District Judge*.—The clerk has a right to demand payment of his costs as they are earned, without waiting for the final determination of the suit on appeal or otherwise. This, as has been repeatedly decided in this circuit, rests on the controlling fact that he must answer to the United States for fees earned, as if collected; and, consequently, if he chooses to give credit therefor, he is none the less answerable than if the cash were received. Hence he has a legal right to exact payment for work done as it progresses, and is not bound to forward or deliver the results of his work until they are paid for.

1. Has the clerk the right to charge fifteen cents per folio for transcripts of a record, or only ten cents per folio? The only provision of the United States statutes under which this class of clerical work falls is in these words: "For a copy of any entry or record, or of any paper on file, for each folio, ten cents." There are other provisions as to the original entries for which fifteen cents per folio are chargeable. R. S. § 828.

The question, therefore, is whether "transcripts" of records for the supreme court fall within the one or other provisions. It may be, as urged, that the accounting officers recognize the distinction claimed, viz., that "transcripts" are to be considered as falling within the rule as to the original entries; still this court must decide the point for itself. What is a transcript forwarded to the supreme court but a "copy" of something ordered by the court in a case at law, or in equity, to be so forwarded? There is no new or original matter to be thus included. The case is closed here, and a copy of what appears is all that can be embraced in the "transcript." Hence, the exception as to that charge is well taken, and the fee bill as to that item will be reduced from fifteen cents per folio to ten cents per folio.

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2. The next exception as to the number of folios has no foundation in fact, and will be overruled.

3. As to binding and express charges the clerk may charge what the same reasonably cost. It does not appear that he has charged otherwise. This exception is overruled.

4. The fee-bill does not disclose what is charged for drawing a bond. It appears that the bond in this case was not drawn by the clerk, and, consequently, he cannot charge for what he did not do. The bond was drawn by appellant's counsel and approved by the court. The charge by the clerk should therefore be for an entry for the filing of the same, and for filing and for an entry of the approval of the same by the court.

The general question embraced in the last exception, viz., that the defendant who has taken an appeal cannot be compelled to pay in *advance* of the final decision the costs incident to an appeal, is overruled, for the reason stated at the beginning of this opinion. The fee-bill will be restated according to the views here expressed.

It should be remarked that when an original entry of an order is made, though less than a folio, it is chargeable as a folio, each entry of a kind standing by itself, distinct from all others.

GRAVELLE v. MINNEAPOLIS & ST. LOUIS RAILWAY CO.

(District of Minnesota. December, 1881.)

1. EVIDENCE — STATE STATUTE FOLLOWED AS RULE OF DECISION.— Sec. 29, ch. 73, statutes of Minnesota concerning depositions, must, under sec. 721 of the Revised Statutes of the United States, be followed in the federal courts in actions at law as a rule of decision.
2. DEPOSITIONS — DISMISSAL OF CAUSE — NEW SUIT.— Held accordingly, that where the plaintiff in a suit in a state court took certain depositions, and after the taking thereof dismissed his suit and brought a new action, which action was removed to the federal court, depositions taken in the first suit were admissible in evidence upon the trial of the cause in the federal court, in accordance with the state law applicable to such cases.

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This was an action brought by the plaintiff against the defendant to recover damages for personal injuries. It was originally instituted in one of the state courts of Minnesota, and while pending there certain depositions were taken. Subsequently the suit was dismissed and a new suit instituted for the same cause of action. The case was then removed to this court, and upon the trial the plaintiff offered in evidence the depositions taken in the original action prior to its dismissal. To the reading of these depositions the defendant objected.

C. K. Davis, for plaintiff.

James D. Springer, for defendant.

McCRARY, *Circuit Judge*.—Section 721 of the Revised Statutes of the United States provides that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply. This provision embraces and requires the federal courts to follow the statutes of the several states which prescribe rules of evidence, except where otherwise provided by the federal constitution or laws. *M'Neal v. Holbrook*, 12 Peters, 84; *Vance v. Campbell*, 1 Black. 421; *Wright v. Bales*, 2 Black. 535; *Diblee v. Furniss*, 4 Blatch. 262; *Hausknecht v. Claypoole*, 1 Black. 431; *Lucas v. Brooks*, 18 Wall. 436; *Best v. Polk*, 18 Wall. 112; *Sims v. Hundley*, 6 How. 1; *Brandon v. Loftis*, 4 How. 127; *Palmer v. Low*, 98 U. S. 1.

Section 29, chapter 73, statutes of Minnesota, provides that "When the plaintiff in any action discontinues it, or it is dismissed for any cause, and another action is afterwards commenced for the same cause between the same parties, or their representatives, all depositions lawfully taken for the first action may be used in the second in the same manner

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and subject to the same conditions and objections as if originally taken for the second action: *provided*, that the deposition has been duly filed in the court where the first action was pending, and remained in custody of the court from the termination of the first action until the commencement of the second."

This statute will be followed as a rule of decision in this court in accordance with the long line of adjudications above cited. This renders it unnecessary to decide whether the same ruling is required by the provisions of sec. 914 of the Revised Statutes of the United States.

The objection to the depositions is overruled.

THATCH v. METROPOLE INSURANCE CO.

(*District of Colorado. January, 1882.*)

1. **INSURANCE POLICY—RIGHT OF ACTION ON.**—O. obtained from defendant insurance on certain premises, the policy containing this provision: "Loss, if any, payable to T., as his interest may appear"—O. being at the time indebted to T., and this indebtedness being secured by trust deed upon the premises covered by the insurance. The premises were destroyed by fire, and T. filed his complaint, demanding judgment on the policy against the insurance company which issued it. Defendant demurred. *Held*, that O., being the owner of the policy, is alone entitled to sue on it; T. has no right of action, and the complaint is bad on demurrer.

HALLETT, *District Judge (orally)*.—This is an action upon a policy of insurance. Plaintiff alleges that Emma V. B. Oray, on the twenty-first day of August, A. D. 1880, obtained of the defendant insurance on certain premises in the town of Idaho Springs. The amount of the insurance is not stated, I believe, but it is alleged that the policy provided for the payment to plaintiff, in case of loss or damage by fire, of some sum, as his interest might appear. It is alleged that plaintiff was a creditor of Emma Oray, and that the indebtedness

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was secured by a trust deed on these premises; that the premises were destroyed by fire, and plaintiff's loss thereby exceeds the sum of \$2,000. There is no definite information in the complaint as to the amount of the insurance, or the amount of the indebtedness due plaintiff from the party insured. It does appear that the policy was taken out by Emma Oray, and paid for by her. She paid the premium. Plaintiff demands judgment for \$2,000.

If it appeared in the complaint that insurance was taken out by this woman, and that the stipulation of the policy is, that the loss, if any should occur, should be paid to the plaintiff, all of it — the entire sum, — a question would be presented as to the right of the plaintiff to recover on such an instrument, which is not very well settled in the authorities. Perhaps the weight of authority is that in such case the plaintiff would be entitled to maintain the action. That is to say, if two persons contract for the benefit of a third, the third party, although a stranger to the consideration, may maintain a suit upon that contract. But that is not the case as presented here. It is entirely consistent with the allegations of this complaint that the sum due the plaintiff was much less than the amount for which the policy of insurance was issued. And at all events, whatever the fact may be as to that, the policy of insurance provided for payment to the plaintiff *as his interest might appear*. At the time of insurance he was a creditor of the party taking out the policy, and his indebtedness might be entirely extinguished or greatly reduced before the policy should mature. That was, perhaps, the reason for putting in the policy this clause in this phraseology, "payment should be made to him as his interest might appear." That is, more or less; the sum due him, whatever it might be; and upon that no right of action can arise to the plaintiff, because it is not a stipulation to pay the plaintiff the loss, all of it, whatever it may be, upon maturity of the policy; and that must be the agreement to enable the plaintiff, under a stipulation of this kind, to recover in the action.

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That is very well expressed in an opinion in the 37th Michigan Reports, page 613, in the case of the *Hartford Ins. Co. v. Davenport*. The court say: "We are also of opinion that the plaintiffs below showed no right to sue upon the contract."

And in this instance the language of the policy was substantially the same as in the case under consideration. The action was by a mortgagee seeking to recover.

"The parties to this policy were Headley and the company.

. . . The policy was to insure his interest and not that of the mortgagees, and any money paid to them would inure to his benefit. They hold no assignment of the policy and sue as original parties.

"No one can dispute the right of parties to a contract to make money payable to a third person, if they see fit."

That is the proposition as I originally stated it, that if one party contracts with another to pay money to a third person, that may be a contract which the third person may sue on.

"It is not important in this case to consider whether, if the policy before us gave the mortgagees an exclusive right to the whole insurance money, they might not sue for it. In the present case the policy does not purport to do any such thing."

That is the case at bar.

"It covers property not included in the mortgage, and only provides for payment to them of the insurance money due upon the property with which they were concerned. Upon the trial it appeared that other property was burned, and the court excluded them from recovering beyond their own share, and Headley lost his share of the money entirely."

"Now there can be no splitting up of the causes of action on a single policy. The party insured retained, by the terms of the policy itself, interests beyond the control of the mortgagees. Their interests were several and not joint. Under such circumstances it cannot be held that the mortgagees have any control of the policy which would authorize them to sue upon it. No doubt the company would be protected

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in paying them their share as equitable appointees, but they cannot be treated as trustees for Headley's benefit. He and not they must be held the legal owner of the policy, which stands in his name and was made for his benefit."

That is the rule here. This Mrs. Oray is owner of this policy, and entitled to sue upon it. Mr. Thatch has no right of action whatever. The demurrer is sustained.

Hugh Butler, for plaintiff.

Charles & Dillon, for defendant.

HENRY *et al.* v. GOLD PARK MINING COMPANY.

(*District of Colorado. December, 1881.*)

1. ATTACHMENT — GARNISHEE — STATUTORY BOND.— Sections 111, 112, Colorado code, do not provide for the discharge of garnishees upon the execution by defendant in attachment of the bond mentioned therein, but only for the release of property taken under attachment and the proceeds of the sale thereof in the hands of the officer. A bond executed in accordance with the provisions of said sections to secure the discharge of a fund in the hands of a garnishee, would not be valid as a statutory undertaking. But if the garnishee pay to the officer money due from him to defendant as provided in the statute, the defendant may have that money released to him by giving a forthcoming bond, pursuant to said sections.

Plaintiff filed complaint and sued out an attachment against the property of the defendant. The Colorado National Bank being summoned as garnishee, answered, admitting an indebtedness to the defendant of some four thousand dollars.

Defendant came into court and tendered bond to the plaintiff, with good surety, conditioned as provided in section 112, civil code of Colorado, and moved that the funds held by the garnishee be released from the attachment, and the garnishee be discharged. The plaintiff resisted the motion.

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Sam P. Rose, for plaintiff.

Wells, Smith & Macon, for defendant.

HALLETT, *District Judge (orally)*.—The sections of the code to which reference was made do not provide for discharging garnishees on giving bond as therein specified; and I think that the language of the sections precludes the notion that the garnishees can be within its provisions.

The first section, 111, declares that “the defendant may at any time release any property in the hands of the sheriff, by virtue of any writ of attachment, by executing an undertaking as provided for in the next section; and all the proceeds of sales and money collected by the sheriff, and all the property attached remaining in his hands shall be released from the attachment and delivered to the defendant upon the justification of the sureties in the undertaking;” and the condition of the undertaking as given in the next section is, that “the defendant will, if the plaintiff shall recover judgment in the action and the attachment is not dissolved, on demand, redeliver such attached property so released to the proper officer, to be applied to the payment of the judgment, and that in default thereof, the defendant and sureties will pay to the plaintiff the full value of the property so released.”

This certainly cannot be applicable to a debt due from a third party, a stranger to the suit, because that cannot be said to be in the hands of the officer in any way.

If that construction should be given to the law, it would be necessary that the officer should determine the value of the indebtedness; the amount and value of it. Now, the garnishee is not required to answer before him; it appears to be optional with him whether he will answer before the officer or come into court.

Mr. Wells — Your Honor is mistaken about that provision. If the party garnished don't give a statement of what is in his hands, he is treated as in contempt.

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The Court — Well, I doubt whether that is the construction to be put upon the statute. But if that be so, the garnishee may not answer truly; he may deny; and if he admits the indebtedness, he may not admit the full amount. When he denies, it is competent for the plaintiff to meet his denial, and go to trial upon the issue so joined. And if he admits an indebtedness, and the plaintiff contends that he owes more than he admits, he may deny that also, and go to trial upon that, and compel him to pay the full amount that he may be able to show is due from him. So that if the garnishee be compelled to answer before the officer and does answer, it cannot be said that his answer shall be taken to be true for the purpose of fixing the amount of the bond to be given to the officer in case he be discharged.

Indeed, it seems to me there is no provision which will be adequate and sufficient to secure the plaintiff for the discharge of a garnishee, except it be one to pay the judgment, such as is often found in these statutes regulating attachments; and I think it is very clear as this statute stands here, that the garnishees are not within its provisions. If the garnishee pays over the money in his hands to the sheriff, then it may be said that that is money collected by the sheriff within the provisions of section 111; and unquestionably when the garnishee pays, the defendant may, by giving bond as provided in these sections, have that money released and surrendered to him. But I think the sections as they stand are applicable only to property which is in the hands of the officer, either money or goods, something which he actually holds in his possession.

The motion will be denied.

McGowan v. The La Plata Mining and Smelting Co.

McGOWAN v. THE LA PLATA MINING AND SMELTING CO.

(District of Colorado. January, 1882.)

1. **MASTER AND SERVANT — NEGLIGENCE — DUTY OF MASTER TO INFORM SERVANT OF DANGER INCIDENT TO OCCUPATION — PRESUMED KNOWLEDGE OF SERVANT AS TO SCIENTIFIC FACTS.**— The master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of the facts. The law will presume, within limits, that every one has knowledge of certain destructive forces in nature, and accepts employment with reference to them — as that fire will burn, water drown, the law of gravitation, etc. But many scientific facts tending to endanger life are not within the intelligence of ordinary men. A laborer employed to remove hot slag from a furnace in proximity to water will not be presumed to know the dangers which may result from the explosion sure to be caused by the contact of the hot slag and the water. It is not so much a question whether the party injured has knowledge of all the facts in his situation, as whether he is aware of the dangers that threaten him.
2. **DAMAGES — AMOUNT OF.**— The verdict will not be set aside for “excessive damages” when it is not apparent that the jury acted from prejudice or passion, or that they passed the limits of fair discretion on the evidence.

Tort for injuries received in defendant's service. In May last defendant was engaged in smelting ores at Leadville, and plaintiff was employed to assist at one of the furnaces as “inside helper.” There were several furnaces in the works, the one at which plaintiff served being known as No. 4. This furnace had two taps for drawing off slag, differing in that respect from the others, which had but one. The slag, in a molten condition, was drawn into pots, which were supported between wheels, with a tongue attached, for moving the pot and contents without the building. After it was filled with slag the tap was closed and the pot was drawn out about eighteen inches and allowed to stand there until the slag cooled sufficiently to form a crust, when it was moved to the dump outside the building. To support the wheels under the taps two iron plates were placed parallel

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with each other. They were three or four feet in length. The slag pot was kept in position under the tap by the spout, which extended over the rim, and when drawn out there was a foot-post under the tongue to support it. For convenience in moving the pot, this foot-post was made shorter than was required to keep the pot level, and when drawn out from the tap, as before explained, it was necessary to support the foot-post on a block of some kind in order to keep the pot level. At some of defendant's furnaces iron plates were used for that purpose. At one there were bricks laid in mortar. At the furnace No. 4, where plaintiff served, there was one brick or perhaps two bricks; whether there was one brick, or two bricks laid one on top of the other, was left in doubt; the plaintiff testified that there was one brick.

Just under the tap at all the furnaces there was a small sump usually filled with water, which receive the droppings of slag from the tap. Water supplied through hose with some force was used at all the furnaces after drawing off slag and bullion, apparently to cool the furnace and the surroundings. As described by the witnesses the use of water was "to wet down the breast of the furnace." In front of the furnace No. 4, there was a slight depression in the floor of the furnace, extending from the tap somewhat further than the iron plates before mentioned, perhaps four or five feet from the furnace in all. At the time plaintiff entered the service and thereafter until the injury, this depression was filled with water, so that there was something like a pool of water there, deeper at some places than at others, as the floor was uneven, but not very deep in any place; perhaps one or two inches of water at some places, and very little at other places. The water came from "wetting down the breast" too freely or from leaks in the hose. In either case it was within the control of the "inside helper."

The furnace was in charge of a furnace-man, who attended to the business of smelting. The "inside helper" was his assistant to tap the furnace, draw the slag, close the tap,

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draw the slag-pot to the door, "wet down the breast," and the like duties. There was evidence tending to prove that he had charge of the tools about the furnace, and that there was a barrel at hand to catch the flow of water from the leaky hose if it should be placed in the barrel. The inside helper could take any steps necessary to prevent the water from gathering in front of the furnace by preventing it from flowing there, or by cutting a drain to carry it off.

On the whole evidence, however, it was plain that the furnace was in charge of the furnace-man, and the helper was subject to his orders. In control of all the furnaces, there was a superintendent, who gave close attention to all that was done, and there was a general manager of the concern, whose function was not clearly shown.

Plaintiff, having no experience in such matters, was employed by the superintendent to work as "inside helper," and was shown how to draw off the slag and move the slag-pots, and to perform other services about the furnace. But nothing was said to him about the water in front of the furnace, or the danger incident to its presence in that place.

In the third shift, which was probably the third day of his service, plaintiff drew out from the tap a pot of slag, and attempted to place the foot-post on the brick, or bricks, before mentioned. By some mischance this was not done, and the foot-post came to the floor, tilting the pot forward, and spilling the hot slag into the water. This caused an explosion of great force, by which plaintiff was injured; his clothes were set on fire, and his person — his face in particular — badly burned. The greatest hurt was to the eyes, which, plaintiff testified, were not yet well. He was blind for sixteen days, and confined to the hospital about two months; resumed work as a teamster about the middle of August.

In the original complaint, the negligence relied on was the failure to provide a slab or block for the foot-post of the slag-pot to rest on. By amendment, the further ground was

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added, that defendant allowed water to collect in front of the furnace, "the collection of which in said place rendered it extremely dangerous in removing and taking away the molten slag from said furnace. That plaintiff was inexperienced in such matters, and was not aware of such danger; and that said defendant did not, in any manner, inform plaintiff of such danger, or warn him against the same, although said defendant well knew of such danger."

The court advised the jury to find whether the defendant was negligent in not warning the plaintiff of the danger of spilling hot slag in the water in front of the furnace. If it was defendant's duty to notify plaintiff of the consequences that might be expected to proceed from allowing the slag to fall in the water, and he was not notified, the defendant would be liable in damages for any injury happening to plaintiff, in the manner detailed by witnesses. If the water in front of the furnace was dangerous to the workmen, by reason of the liability to spill the slag into it, was it defendant's duty to give warning of such danger? If plaintiff had been injured by spilling slag on his foot, or in such manner that it would flow against his person, he could not recover, because that was a danger which he must foresee and guard against at his peril. Defendant could be held only on the theory that there was danger from allowing the hot slag to fall into the water, of which defendant was informed, and plaintiff was not, and that defendant owed to plaintiff a duty to inform him of the danger, and that duty had not been performed.

As to the measure of damages, plaintiff could have compensation only for his illness; the pain and suffering proceeding from the injuries. He could have nothing for the loss of time, as he had not shown its value. And nothing for medical and other attendance, as he had not shown any expenditure in that behalf.

Defendant excepted to the charge and to the refusal of the court to give certain instructions submitted.

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The jury returned a verdict for plaintiff, assessing damages at \$3,250.

Defendant filed this motion for new trial, alleging error in the charge, and that the damages are excessive.

J. D. Murphy and *T. A. Green*, for plaintiff.

J. F. Frueauff, for defendant.

HALLETT, District Judge.— That a master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of such facts, seems to be conceded.

A lot owner employed a carpenter to build for him, but did not inform the carpenter that his title to the lot was contested. The carpenter, pursuing his labor on the lot without suspicion of danger, was attacked by the parties claiming adversely to the employer, and severely injured. On this the employer was held liable in damages for his omission to notify his servant of the danger impending. *Baxter v. Roberts*, 44 Cal. 187.

A miner employed to sink a shaft was not informed of a crack or opening in the side of the shaft, of which his employer had knowledge. The shaft caved in and injured the miner, and his employer was held liable for his negligence in not giving notice of the crack in the shaft. *Strahlendorf v. Rosenthal*, 30 Wis. 675.

But it is contended that the rule cannot be applicable to the case at bar, as it relates only to *facts* withheld from the servant, and not to instruction in the principles of natural philosophy. The water in front of the furnace, and the act of overturning the hot slag, may have come of the negligence of the plaintiff. Indeed, the evidence points to that conclusion. And the explosion which followed was the natural result, of which plaintiff should have been informed; or, at all events, defendant was under no duty to inform him.

This is the argument against the verdict. And certainly,

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within limits, the law will assume that everyone has knowledge of destructive forces in the world and the powers of the earth and air. Of such is the knowledge that comes to every man of sound mind in the ordinary course of his life: that fire will burn; that water will drown; that one may fall off a precipice, and the like. Recently in this court it was said of one who mounted a push-car on a railroad, and went down a steep grade, to his hurt, that, knowing the grade, it was his own folly not to heed the law of gravitation; because it is known to all men of sound mind and of all degrees of intelligence that wheeled vehicles go down hill with increasing speed if left to themselves.

And in this case the jury was told that the plaintiff could not have recovered for a burn caused by spilling the slag on himself. But the explosive power of hot slag when cast into water is not within the intelligence of ordinary men. It is doubtful whether many people of education know the force and violence of such an explosion; and, if fully informed, how many of them, when put to service at a smelting furnace, would recall their learning without a suggestion from some source.

What the law will presume as to the knowledge of men in matters of this kind, may, in some instances, be a question of difficulty, and certainly it would not be easy to lay down a general rule on the subject. In the face of the plaintiff's testimony, however, to the effect that he had no knowledge or information of the danger to which he was exposed, it would be manifestly unjust in this instance to hold, as matter of law, that he had notice of it.

After all, it is not so much a question whether the party injured has knowledge of all the facts in his situation, but whether he is aware of the danger that threatens him. What avails it to him that all the facts are known, if he cannot make the deduction that peril arises from the relation of the facts? The peril may be a fact in itself of which he should be informed. So in *Coombs v. New Bedford Cordage*

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Co. 102 Mass. 573, the machinery which caused the injury was open to view, and probably it was seen by the party injured. But the danger of the position was not explained as was necessary for the protection of one who had no knowledge of it. In another case in the same court the rule was applied to an adult person who had full knowledge of all the facts out of which danger arose, but the danger itself was not pointed out to him. *O'Connor v. Adams*, 120 Mass. 427. The correct rule as to defendant's liability was announced at the trial, and as to the damages, the amount is not so large as to challenge the attention of the court. To one in plaintiff's situation the sum is considerable without doubt, but the injury was great and the suffering intense. It is impossible to say that the jury acted from prejudice or passion, or that they passed the limits of fair discretion on the evidence.

The motion for a new trial will be denied.

STATE OF MISSOURI, etc., v. F. TIEDERMANN.

(*Eastern District of Missouri. October, 1881.*)

1. SURETY — HOW FAR BOUND BY THE JUDGMENT AGAINST HIS PRINCIPAL IN A SUIT TO WHICH HE IS NOT A PARTY.— A party sued as surety upon a bond given to secure the faithful performance of a contract by the principal, to construct a school-house within a specified time, upon certain terms and conditions, is not bound by a judgment against his principal, in a suit to which he is not a party, establishing certain claims as mechanics' liens upon such school-house.
2. SAME — MECHANIC'S LIEN — PUBLIC SCHOOL BUILDING.— It having been settled by repeated decisions of the supreme court of Missouri, that there can be no such thing as a mechanic's lien upon a public school building, a surety upon such a bond as the one above named may, in defending a suit upon the same, deny the validity of a judgment establishing such a lien, so far as he is concerned, such a judgment having been rendered in a suit to which he was not a party.

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3. **EFFECT OF REMOVAL OF PART OF CAUSE FROM STATE COURT — RES ADJUDICATA.**— Where suit was brought in a state court against principal and surety upon the bond above mentioned, and removed, as to the surety, into the circuit court of the United States, under the act of congress of 1866, providing for the removal of part of a cause: *Held*, that from the time the order of removal was made, the surety passed from the jurisdiction of the state court and had no right to appear there any further, and is, therefore, not bound by the judgment there against the principal. A party is bound by an adjudication only where he is so far within the jurisdiction of the court as to be at liberty to participate in the management and control of the litigation.
4. **SURETY — RIGHTS OF, IN SETTLEMENT WITH THE OBLIGEE IN THE BOND.**— A surety is not bound by a settlement between his principal and the obligee of the bond, to which he has not assented; but has a right to a settlement of his liability precisely as if he had been present at such settlement, and had availed himself of all his rights and of all the defenses which the principal could have availed himself of.

This was an action originally brought in one of the state courts of Missouri, against Diedrich Tiedermann as principal, and Frederick Tiedermann as surety, upon a bond, conditioned that the principal should carry out in good faith the provisions of a certain contract for the building of a public school-house. Frederick Tiedermann, the surety, being a citizen of the state of Illinois, applied for and obtained an order removing the cause, so far as he was concerned, from the state court to the United States court. Thereafter the case went to judgment as against the principal in the state court. Among other things it was alleged that the defendants in said suit in the state court on the bond were liable, because the principal contractor had permitted certain liens to be established against the public school building on account of materials furnished to be used by him in the construction thereof, and had allowed judgment to go against him, establishing said liens, in one of the courts of the state of Missouri. The judgments in said mechanics' lien cases were offered as evidence against the surety in this court.

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Objection being made to their admissibility, the following opinion was delivered sustaining the objection:

McCARY, *Circuit Judge*.—On the question argued and submitted yesterday I am prepared to announce the conclusion reached by the court. The liability of this defendant is that of a surety only. The contracts of sureties, as we all very well understand, are to be construed strictly in favor of the surety. The contract of this party was, in substance, that his principal should carry out, in good faith, the provisions of the contract for the building of a public school-house. Briefly stated, that contract was that he would furnish the material and build the school-house for \$15,000 within a certain specified time. The present question is whether the surety can be charged as liable, upon his contract of suretyship, for certain claims of mechanics' liens against the public school building upon which suits were brought, and in which suits judgments were rendered against the school board and against the principal, establishing the mechanics' liens. The plaintiff presents here the records of these judgments and offers them in evidence. The amounts paid upon these mechanics' liens exceeded the \$15,000 for which the building was to have been constructed and completed. The supreme court of Missouri, in the other branch of this case, held that the principal was liable on this account to refund the amount which was paid out by the board to settle these claims which are spoken of here as mechanics' liens. It does not, however, follow that the surety is liable to the same extent. The supreme court may have held that, as against the principal, the mechanics' liens were established by an adjudication, and that neither the board of education, nor Mr. Diedrich Tiedermann, the principal on this bond, could question the validity of those judgments; or it may have been of opinion that this was money advanced for the use and benefit of the contractor, the principal, by the school board, and that he ought to be held to refund it.

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However that may be, the surety was not in court at that time; he was not a party to this proceeding by which the mechanics' liens were established; he was not the contractor; he had not made this indebtedness; and he can only be held upon the ground that it was an indebtedness created in violation of his obligation of suretyship. This can only be held on the ground that it was a valid mechanic's lien established upon the property, because the contractor failed to keep his contract and pay for the material that he used in the construction of the building. The law of Missouri, as established by repeated decisions, is that there can be no such thing as a mechanic's lien upon a public school building. That is the construction of the statute of this state repeatedly adopted by the supreme court of the state, and it is binding upon this court, and it is, in our judgment, perfectly sound, independent of any adjudication. The surety here has a right to raise this question now, for it has never been raised where he was a party; he has a right to say and insist that the school board was not bound, as against him, to pay these claims for mechanics' liens, and that if they did so, so far as he is concerned, it was a voluntary payment of a claim for which he was not liable. Of course it will not be insisted that the surety upon the bond is liable for an overpayment to the principal. The surety can only be held upon the ground, as I have already said, that this was a valid mechanic's lien upon the school building, which the board was bound to pay for the purpose of protecting their property. As the present defendant has a right now, for the first time, to raise the question whether this was a valid mechanic's lien and an incumbrance upon the school building, and as he has raised it, we feel bound to hold that it was not; that the payment, so far as the surety is concerned, was a voluntary payment. The objection to this evidence must, therefore, be sustained.

The plaintiff offered to prove the settlement made between it and the principal, whereby he was charged with the mechanics' lien claims above mentioned. This evidence was

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objected to on behalf of the defendant, and the objection sustained, the ruling of the court being announced as follows:

McCrary, *Circuit Judge*.—Upon reflection I am very clearly of the opinion that this defendant, as surety on the bond, has a right to a settlement of his liability upon his bond under the contract, and is entitled to whatever rights he would have had if he had been present at a settlement under the contract at the time that the building was delivered over, or at any other time. The rights that his principal had against this plaintiff under the contract he has a right to avail himself of as a defense in this case, the same as if he had been present and had insisted upon all his rights at such a settlement. The ruling, therefore, that has already been made in the case is conclusive of this question. The payment of the mechanics' lien claims was outside of and beyond the contract. Perhaps as between the plaintiff here and the principal on the bond, the plaintiff could pay those claims and charge them to the principal in their settlement with him. At all events, after there was a judgment upon them that concluded them both, they had a right to act upon the hypothesis that they were valid and that the board was bound to pay them; but we have found upon investigation that they were not valid claims, and that their payment did not bind this defendant as surety; I think, therefore, that the objection to the evidence now offered must be sustained.

It was further insisted that the surety as well as the principal was bound by the judgment of the state court, rendered against the principal after the removal of the cause, so far as the surety was concerned, into this court. Upon this branch of the case the following opinion was delivered by the same judge:

It will be unnecessary to go into a discussion of the long line of cases upon the general subject of *res adjudicata*, as to how far parties and privies are bound by the judgments of courts of general jurisdiction, because this case is one of

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a class of its own and stands by itself. The act of congress provides, or did provide — for I think that act is now repealed by the later act on the subject, and I am very glad that it is — for splitting a case in the state court, and bringing so much of it as constitutes a controversy between citizens of different states into a federal court. Under that act so much of this controversy as is between the plaintiff and the surety upon the bond has been brought here, while so much of it as is between the plaintiff and the principal upon the bond remained in the state court, and has been tried there. The fundamental principle upon this subject is, that a party is bound by an adjudication only where he is, so far, at least, within the jurisdiction of the court as to be heard in the course of the litigation; he must be a party to the suit or proceeding in such sense as to have a right to appear there, to make motions to the court, to introduce testimony, to cross-examine witnesses, and to take an appeal. Those are the rights which, generally, a party must have in order to be bound by an adjudication. Now, we must assume that this case was properly removed, as I have before said in considering some preliminary questions, and, assuming that, we are bound to say that after removal, the moment the order of removal was made, this defendant passed from the jurisdiction of the state court. He had no right to appear there any further, he had no power to introduce testimony, to make motions, to be heard, or to take an appeal. Besides, as counsel have suggested, the whole purpose of the removal act of 1866 would be defeated by the construction which is contended for by the counsel for the plaintiff. If the party who brings a part of a case into this court, for the purpose of litigating it here, is bound, nevertheless, by the litigation in the state court, from which he removed it, against some other party, and we are bound by the judgment there, then it follows, of course, that there is no litigation here, and the party who removes the case here does not have any benefit of the removal. It is one of the difficulties which grows

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out of that very anomalous statute providing for splitting up cases. The best we can do, I think, is to say that the party, having a right to come here, has a right to be heard here upon the merits of his controversy. The adjudication of the state court, I think, is admissible for one purpose, and that is to show the amount of the recovery, in order that the surety may not, in any event, be held for more than the principal; but for the purpose of concluding the defendant upon any other issue, we think it is not admissible.

HOLMES *et al.* v. SHERWOOD *et al.*

(*District of Iowa. October, 1881.*)

1. **RECEIVER — RIGHT TO SUE IN A FOREIGN JURISDICTION.**—The question of the right of a receiver to sue in a foreign jurisdiction considered but not finally decided.
2. **CORPORATION — JUDGMENT CREDITOR — ACTION AGAINST STOCKHOLDERS.**—A judgment creditor of a corporation, after execution returned unsatisfied, may maintain an action in his own behalf and in behalf of such other creditors of the corporation which may join him in a court of equity against the corporation and its delinquent stockholders, and have a decree that an account of the assets and debts of the corporation be taken, and that the stockholders pay in and account for so much as may be due from them respectively to the corporation on account of their capital stock, as will be sufficient to pay the debts represented by the complainants and other creditors joining them.
3. **REMEDY IN EQUITY.**—Although a remedy at law may be provided by statute against an individual stockholder to enforce contribution, yet a federal court of equity is not thereby deprived of its jurisdiction to entertain a bill filed against numerous stockholders for discovery, account and contribution against them all.
4. **EQUITY PLEADING — IN WHAT CASES AN AFFIDAVIT OF LOSS OF PAPERS MUST BE FILED.**—Where resort is had to a court of equity instead of a court of law, upon the ground that the instruments upon which the action is founded have been lost, destroyed or suppressed, it is necessary to annex to the bill an affidavit that such instruments are not in the custody or power of the complainant, and that he knows not where they are, unless in the hands of the defendant. But the present case does not come within that rule.

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K. STOCKHOLDERS' LIABILITY — ASSESSMENT.— Where the stockholders as a corporation are liable to the full amount of their unpaid subscriptions, an assessment before suit is not necessary. The stockholders, within the jurisdiction, may be required to pay the sums due from them, so far as required, to pay the judgments sued on, and if there are other delinquent stockholders outside of the jurisdiction, the stockholders sued must look to them for contribution.

In equity.

On demurrer to complainants' bill.

The several complainants, except George Chandler, are judgment creditors of the Lamar Insurance Company, a corporation organized under a special act of the general assembly of the state of Illinois, approved February 16, 1865; and the said Chandler sues as receiver of the said Lamar Insurance Company, appointed by the superior court of Cook county, Illinois. There are a large number of defendants, all of whom, as alleged in the bill, are stockholders in the said corporation. It is averred that the corporation is insolvent; that the several complainants have obtained judgments against it upon which executions have been issued and returned "no property found" and unsatisfied; and it is averred that the several defendants are indebted to the corporation on account of their subscriptions to the stock thereof.

There is a prayer for discovery and for an account, and that the respondents severally may be decreed to pay to complainants such amount or amounts, not exceeding the amount of unpaid stock due from each of them, as may be necessary to pay the sums due to complainants respectively and other creditors who may become parties hereto, from the said Lamar Insurance Company, together with interest and costs. It is averred that the several respondents are citizens of Iowa, and that the complainants are citizens of Illinois. The respondents demur to the bill upon the grounds which are stated in the opinion.

A. B. Cummins, for complainants.

J. M. Parker and *C. C. Cole*, for respondents.

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McCRARY, *Circuit Judge*.—1. It is insisted that the bill is multifarious in the misjoinder of the receiver appointed by the Illinois court and the creditors of the corporation; and it is argued under this head, in the brief filed, that the receiver is the only party with right to sue. As I remember the oral argument of respondents' counsel, it was suggested that the receiver having been appointed by a foreign court, had no right to sue in this forum at all; and this latter question must be disposed of before we can determine the question of multifariousness. If the receiver has no right to sue, the case must be dismissed as to him, and then the question will remain whether it can be maintained by the other complainants, to wit, the creditors of the corporation. Upon the question whether the complainant, Chandler, in this official capacity as receiver under the appointment by the superior court of Cook county, Illinois, can be permitted to sue in this jurisdiction to recover the property of the debtor, I must say that I have grave doubt. The case of *Booth v. Clark*, 17 Howard, 322, seems to hold quite distinctly that a receiver has no right to sue in a foreign jurisdiction. It is said in that case that the receiver "has no extra-territorial power of official action; none which the court appointing him can confer, with authority to enable him to go into a foreign jurisdiction to take possession of the debtor's property; none which can give him, upon the principle of comity, a privilege to sue in a foreign court or another jurisdiction, as the judgment creditor himself might have done, where his debtor may be amenable to the tribunal which the creditor may seek." See also High on Receivers, secs. 239 to 244 inclusive, and authorities there cited. I am aware of the intimation of a different opinion by Mr. Justice Miller in the case of *Chandler v. Siddle*, 3 Dillon, 477; but as no unqualified opinion was there expressed upon the question, and as it was not decided, I should be inclined to follow the case of *Booth v. Clark*, and the other authorities in the same line, if it were necessary to pass finally upon the question in this case.

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2. But I am clearly of the opinion that this suit may be maintained by the complainants who are creditors of the corporation, without the presence of the receiver. It is well settled by the authorities, and also well supported by considerations of justice and equity, that a judgment creditor of a corporation, after execution returned unsatisfied, may maintain an action in his own behalf and in behalf of such other creditors of the corporation as may unite to become parties thereto in a court of equity, against the corporation and its delinquent stockholders, and have a decree that an account of the assets and debts of the corporation be taken, and that the stockholders pay in and account for so much as may be due from them respectively to the corporation on account of their capital stock, as will be sufficient to pay the debts represented by the complainants and such other creditors as may join. The liability of the stockholders is, in part at least, the basis of the credit which is extended to the corporation by the public. Any sums due from such stockholders to the corporation on account of subscriptions to the capital stock are regarded as a trust fund pledged for the debts of the corporation; and any one or more of the creditors of the corporation may institute proceedings in equity to compel contribution from the stockholders who may be found within the jurisdiction of the court in which such proceedings are instituted. These general propositions will be found to be fully supported by the following and many other authorities: *Adler v. The Manuf'g Co.* 13 Wis. 63; *Spear v. Grant*, 16 Mass. 9; *Vose v. Grant*, 15 id. 505; *Wood v. Dummer*, 3 Mason, 308; *Ward v. Griswoldville Man. Co.* 16 Conn. 593; *Mann v. Pentz*, 3 Comst. 415; *Nathan v. Whitlock*, 9 Paige, 152; *Henry v. V. & A. R. R. Co.* 17 Ohio, 187; *Ogilvie v. Knox Ins. Co.* 22 How. (U. S.) 380.

3. It is insisted, however, by respondents' counsel, that the remedy is at law and not at equity. This proposition cannot be maintained. It may be correct to say that an action at law to enforce contribution against an individual stockholder may be maintained under the act by which the Lamar

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Insurance Company was incorporated; and if this is so, it does not deprive this court of equity of its jurisdiction to entertain a bill filed against numerous stockholders for discovery, account and contribution against them all. Although a creditor may enforce a contribution at law, yet, as he may not be able to do it without numerous suits, his case is one of equitable jurisdiction." Angell & Ames on Corporations, sec. 626. The jurisdiction in equity may be maintained under any one of the following ordinary heads of equitable jurisdiction, to wit: discovery, account, contribution and to prevent multiplicity of suits. This disposes of the objection that there is a misjoinder of parties defendant.

4. It is insisted that the interrogatory part of the bill is bad because it calls upon the respondents severally to answer whether they executed a bond or instrument in writing or print by which they received and became the owners of a share or shares of stock of the Lamar Insurance Company, and whether they received certificates of the share or shares of such stock, and does not annex an affidavit of loss, or that the complainants are not in possession of the primary evidence of the facts respecting which they seek a discovery. Counsel cite in support of this proposition, Story's Equity Pleadings, secs. 477, 478, 313. These sections relate to cases where resort is had to a court of equity instead of a court of law upon the ground that the writings upon which the action is founded have been lost, destroyed or suppressed. In such cases it is necessary to annex to the bill an affidavit that such instruments are not in the custody or power of the complainant, and that he knows not where they are unless in the hands of the defendant. The present bill does not come within this class of cases. I am of the opinion that it is not demurrable for the want of such an affidavit.

5. In such a case as the one now before the court, no previous assessment against the defendants as stockholders need be shown. They are liable to the full amount of their unpaid subscriptions to the capital stock of the corporation, if

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so much is necessary to pay the claims represented by the complainants in this suit. If there are other stockholders not within the jurisdiction, or not made parties defendant herein, these defendants must look to them for contribution; and it is not necessary that all such stockholders be made defendants. *Ogilvie v. Ins. Co.* 22 How. 380; *Marsh v. Burrows*, 2 Woods, 463. If an assessment has been made in the state of Illinois, either by the board of directors or by the court, such assessment cannot conclude or affect the stockholders in this state, and who are defendants in this case, because they were not parties to it or in anywise bound by it.

The court is competent to ascertain the amount of the liability of each of the respondents, and to make a decree based thereon. If the complainants see fit to dismiss as to the receiver, the demurrer will be overruled. If they do not see fit to do this, the demurrer will be sustained so far as that matter is concerned.

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ST. PAUL & SIOUX CITY R. CO. v. THE SAME.

(District of Minnesota. November, 1881.)

1. SWAMP LANDS — ACT OF CONGRESS — WHEN TO TAKE EFFECT. — Title to swamp land was not vested by the act of congress of September 28, 1850, until the admission of a territory into the Union. Hence, the state of Minnesota not having been admitted into the Union at the date of the passage of the act granting lands to the territory or future state of Minnesota for the construction of railroads, approved March 3, 1857, a grantee of the state, by virtue of the acts of the legislature approved March 8, 1861, and March 4, 1864, has a good title as against one whose title depends upon the proper construction of the acts of congress approved September 28, 1850, and March 12, 1860.

NELSON, *District Judge*. — This suit is instituted to establish the superior right of the complainants to the land in controversy. The equitable title is claimed to be in the

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complainant and the legal title in the defendant. The defendant's title is derived from the state of Minnesota by conveyance under the authority of an act of its legislature, the land being described as swamp, and certified to the state as swamp lands belonging to it by virtue of the acts of congress approved September 28, 1850, and March 12, 1860. The complainant's title is claimed to be vested under the act of congress passed March 3, 1857, granting lands to the territory or future state of Minnesota to aid in the construction of railroads, and subsequent acts, disposing of those lands for that purpose, passed by the legislature of the state March 8, 1861, and March 4, 1864.

CONCLUSIONS.

1. The state of Minnesota was admitted into the Union May 11, 1858, and the title under the swamp-land act did not take effect until the date of this act of admission.

2. The title to the land in controversy was in the United States at the time of the passage of the act granting lands to the territory or future state of Minnesota for the construction of railroads, approved March 3, 1857, and there is nothing in the acts of congress of September 28, 1850, which prevented congress from granting this land for that purpose.

3. The land was not reserved out of that grant by any of the provisions embodied in the act of March 3, 1857, but is located within the limits prescribed therein, and inured to the complainant's benefit, and the title became vested in it by virtue of the acts of the legislature of the state of Minnesota, approved March 8, 1861, and March 4, 1864.

The complainants are, therefore, entitled to a decree, and it is so ordered.

McCRARY, *Circuit Judge*, concurred.

E. C. Palmer, for complainant.

John B. & W. H. Sanborn, for defendant.

White v. Crawford and others.

WHITE v. CRAWFORD and others.

(*District of Minnesota. November, 1881.*)

1. **PROVING CLAIM IN BANKRUPTCY — LIENS — WAIVER.**— A creditor waives any lien he may have upon the property of his debtor, by proving up his debt as an unsecured claim.

Robert P. Lewis, one of the defendants, on the seventh day of June, 1875, gave his note, and a mortgage to secure the same, on the S. W. qr. of section 22, in township 30, range 22, excepting therefrom five acres in the S. E. corner thereof, to John W. White, the plaintiff, intending, however, to convey such property in township 29 instead of township 30. On the first day of July, 1876, the said Lewis gave a second note, and a mortgage to secure the same, on the same property as described in the first mortgage, as also upon a certain other piece of property; but, in this second mortgage, making the same mistake as in the first. Again, September 1, 1877, the said Lewis, having discovered his mistake made in the first and second mortgages, makes a third mortgage for the purpose of correcting the mistake, in which he describes the property as being in township 29. Between the giving of the first two mortgages and the third, correcting the first two, one James A. Crawford, a brother or near kin of Alexander Crawford, obtains a judgment against Robert P. Lewis and pretends to docket the same, which judgment was thereafter, February 4, 1878, assigned to the defendant Alexander Crawford. Upon this judgment the said Alexander Crawford issued execution, which was levied on this property in township 29, and the same was sold April 8, 1879, he buying it in for the sum of \$1,800. Prior to this sale, however, the said Alexander Crawford had due notice of the mortgage claim of plaintiff upon this land. Prior to said execution and sale R. P. Lewis commenced proceedings in bankruptcy for a discharge from his debts, to wit, on August 31, 1878; his discharge being granted April 15, 1879, only seven days

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after the sale of said property. During the pendency of the proceedings in bankruptcy, and prior to the execution and sale, the said Alexander Crawford proved up his entire claim in the bankrupt court, without any reference to his lien upon this property, making affidavit that he had no lien upon this or any other property.

E. Webb, for plaintiff.

R. B. Galusha, for defendant Crawford.

NELSON, *District Judge*.—I have examined this case, and find nothing new presented which can reverse the decision already made and set aside the order for a decree. The defendant Crawford proved his debt as an unsecured claim, and made affidavit to that effect in the form prescribed by law. Subsequently he issued execution on the judgment, pending the bankruptcy proceedings, and attempted to collect this claim, which was in judgment and a lien upon real estate at the time, as he now insists, when he made and filed his proof. If he was a creditor having a lien, by proving his debt secured thereby to the full amount he waives his lien, and relinquishes it. Such has been the ruling even in respect to mortgages upon specific property. Before a secured creditor can prove his full claim as an unsecured debt he must surrender the security. There is no distinction made in the kind of security. 1 B. R. 147, 485, 400; 8 B. R. 241. Crawford could have refused to prove his debt or appear in the bankruptcy court, and looked to the lien which he claims his judgment gave him; and unless the assignee took action and assumed control of the property on which the lien attached, might have subjected it to the discharge of his debt. But he did not do this. He acted upon the theory that he could prove his debt as unsecured, and at the same time enforce the lien which the judgment gave him. There is no support for such a claim. 95 U. S. 764.

The complainant's equity is superior, and the order for a decree must stand.

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DOWNTON v. THE YAEGER MILLING CO.

(*Eastern District of Missouri. March, 1879.*)

1. LETTERS PATENT — MIDLINGS FLOUR. — Certain instruments, set out in full in the opinion delivered by the court, *held* not to amount to such an assignment by Downton, a patentee for a process patent, of which the claim is for manufacturing middlings flour by passing the middlings through or between rolls, of his right as patentee, as to preclude him from suing third parties who infringe his patent.

In equity.

DILLON, *Circuit Judge (orally)*. — We are prepared to announce our conclusions in the case of *Downton v. The Yaeger Milling Co.* This is a bill in equity by the complainant, as the patentee in a certain patent granted by the United States for an invention — in character of a process patent, — against the Yaeger Milling Company for infringing the monopoly or rights granted by that patent. The issues have been made up, and proofs have been taken. We ordered an argument on the question of assignment and estoppel, since that question, if decided in one way, would end the case against the complainant and obviate the necessity of the court going into the proofs on the merits.

Some time about the year 1872 — that, perhaps, is common knowledge in this country now — there was brought into successful operation and practice the manufacture of flour of a superior quality or grade, from what is known to millers as the “middlings.” Before that time, in America, at all events — although it was shown by the proofs in another case that they had much more intelligent conceptions on this subject abroad, and especially in France, — in America, however, prior to that time, what is known as the middlings, which constitute the most nutritious portion of the grain, by reason of a greater relative portion of gluten — a nitrogenous substance which is more nutritious than the other parts of the wheat, — by what is known as the “new process,” were shown to be susceptible of making flour, as I said before, of a su-

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perior quality, and had the effect of revolutionizing the process of manufacturing flour very largely, and, at all events, to bring the spring wheat of the country, for economical purposes, in more favorable competition, if not on a par, with the winter wheats of the country. Now, when that improvement was practiced or brought into successful operation a year or two afterwards, the United States granted to Mr. Downton, the complainant in this case, what is known as a process patent, as distinguished from a patent for a mechanical device, which sufficiently appears from the claim which he made. After describing the state of the art, as required, he proceeds to state in the claim what he insists is covered by his invention, and for what he wants a monopoly or patent. Now, that claim is this: "The hereinafter described process of manufacturing middlings flour by passing the middlings through or between rolls." The middlings are a comparatively coarse product, and instead of regrinding them at once, as had been theretofore practiced, Mr. Downton claims a patent, and procured one, for passing them between rolls (instead of comminuting or triturating them and reducing them to an impalpable powder), which has the effect of flattening certain impurities, and they are enabled by a sifting process to eliminate said impurities before the middlings are reground; that is the process, viz., by the use of rolls as an intermediate step or process in the art of manufacturing flour. So he says:

"I claim, as new, the herein-described process of manufacturing middlings flour by passing the middlings, after their discharge from a purifier, through or between rolls, and subsequently bolting and grinding the same for the purposes set forth."

The point is that this is a process patent, as distinguished from a patent for a mechanical device. This difference in the law concerning patents for inventions is one of great moment. If it is a patent for a process, the particular mechanical device by which the process is worked is not

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patented; any machinery or mechanical device for executing the patent is not embraced in it. Generally a patent for a process, for that reason, is very much more valuable than a patent for a mechanical device, because whatever way you make any alteration in the device changes the nature of it, if it be for a combination patent; if you add an element, or omit an element, such patent is easily evaded. But not so with the process patent, which has no concern with the *specific* mechanical devices or contrivances by which the process is worked.

Now, Mr. Downton, after securing that patent, and, as shown by the proofs, being an intelligent man, and with an ingenious mind, also contemplated the procuring at this time of a patent for machinery for the purpose of working his process; for instance, this patent is to be worked, as it appears, by rolls and rollers, and he contemplated at this time the procuring of a patent for rolls — for a mechanical device, or machinery to operate his patent, and also for what is known as a middlings duster, known as “Downton’s Peerless Middlings Duster.”

Now, after he had obtained this process patent, and when he had these patents for machines in contemplation, he fell in with the firm of Allis & Co., of Milwaukee and Chicago, who it seems had a large establishment for the manufacture of machines of various kinds. Downton having the patents — that is, having one and contemplating getting others, — it was supposed they could make an arrangement to act together (Allis & Co. to manufacture the rolls and duster, and avail themselves of Downton’s patent for the right or process), and they made a series of contracts. I will allude to each of them very briefly. The only one now material to be considered is the one I first read:

“For and in consideration of the sum of \$125, to me in hand paid, I hereby sell, assign, and set over to Edward P. Allis & Co., of Milwaukee, Wisconsin, their successors and assigns, the exclusive right to manufacture and sell rolls for

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crushing grain or middlings, or other substances, No. 162,157, dated April 20, 1875 [which is the only process patent that was granted, and which was the only patent that had been granted to Downton at that time], for the full life of such patent, and any reissues, extensions, or improvements thereon, except that the shop-right to manufacture and sell in the state of Minnesota, but not elsewhere, is granted to O. A. Pray, of Minneapolis; said Allis & Co. also having an equal right to sell in said state. Dated at Milwaukee, Wisconsin, this twenty-fourth day of January, A. D. 1876.

[Signed]

“ROBERT L. DOWNTON.”

The next contract, of the same date and a part of the same transactions, is an agreement:

“For and in consideration of the sum of \$125, to me in hand paid, and the further payment of the patent fees thereon, I do hereby sell, assign, and set over to Edward P. Allis & Co., of Milwaukee, Wisconsin, their successors and assigns, the exclusive right to manufacture and sell a certain machine for which I agree to obtain a patent, to be known as ‘Downton’s Peerless Middlings Duster,’ for the full term of the patent, or any improvement or extensions thereon; and, upon the obtaining of said patent, I hereby agree to execute such assignment.

[Signed]

“ROBERT L. DOWNTON.”

The third agreement on the same day is as follows:

“Witnesseth, that whereas, by certain agreements, bearing even date herewith, the rights to the exclusive manufacture of ‘Downton’s Peerless Middlings Duster,’ and rolls for crushing grain, etc., patented by said Robert L. Downton, have been conveyed by him to said Allis & Co., . . . it is hereby agreed that the engagement of said Robert L. Downton of his exclusive services to said Allis & Co., at the above rate of \$1,500 per annum, may be ended upon notice of six months by either party, or without notice by payment of the sum of \$750 in money; and it is understood that said

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Downton is not entitled to take away any patterns, or otherwise, of any of the machines made by said Allis & Co."

[Signed by the parties.]

With this addenda:

"In case of the termination of the above engagement by death, or other casualty, the right to sell the machines referred to in the above agreement shall revert to the heirs or successors of R. L. Downton, the manufacture continuing in said Allis & Co., to whom all orders are to be sent."

[Signed by the parties.]

That was in January, 1876. Downton, the patentee under this patent, went into the employ of Allis & Co. under this agreement, and while in Allis & Co.'s employment he made a contract as the representative of Allis & Co., and of himself, in realty, as connected with Allis & Co., by virtue of this contract, with the Yaeger Milling Company to put certain rolls, which had been manufactured, or were to be manufactured, by Allis & Co., into their mill, which they were erecting at that time in this city. And two sets of rolls, manufactured by Allis & Co. pending the continuing of the arrangement between them and Downton, were put into the mill under that contract which had been made by Downton, representing Allis & Co. as well as himself. After these had been put in, Allis & Co. failed, and proceedings in bankruptcy were commenced against them. *That*, Downton seemed to have conceived, had the effect to end these three contracts between himself and Allis & Co., and, at all events, from that time all business relations or connections between them ceased, as it is claimed. Allis & Co. were not adjudged bankrupts. They made an agreement or composition with their creditors, and proceeded in business. So that any rights they had under that contract they still have. Thus, the bankruptcy, by reason of its termination in this manner, ceases to be material in ascertaining the relations of the parties. As to the special point now under consideration, we

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assume that the proofs show that Yaeger & Co. had notice of the bankruptcy, and that Downton claimed that he had terminated this arrangement, and that Downton insisted that the whole contract between himself and Allis & Co. was at an end, and that all rights thereunder had reverted to him. After this, and after the alleged notice of the character I have described, Allis & Co., claiming that the contract was still in force and that they were the assignees of all rights of Downton, continued to manufacture these rolls, and the Yaeger Milling Company put in several other sets of rolls in their mill.

Now, this is a bill by Downton, as the holder of the process patent to which I have adverted, against the Yaeger Milling Company for infringement of his rights under that patent in the use of these rolls, under the circumstances I have stated. This is an outline of the case.

Now, one question on which we ordered an argument is whether, under these circumstances, whatever may be Downton's rights as between himself and the rest of mankind, or as between himself and Allis & Co., who are not parties on the record in this suit, as Mr. Downton has never had judicial settlement or adjustment of his rights in a direct proceeding with Allis & Co.—whatever might be the rights of Mr. Downton as against anybody else,—the question is whether he was not equitably estopped, as against Yaeger & Co., from insisting that they infringed his patent, by reason of the circumstances I have stated. The counsel have been heard on that, and we agree (Judge Treat and myself) that so far as the two rolls are concerned that were put in by Downton himself during the pendency of his relations with Allis & Co., and for which they paid Allis & Co., he is estopped to claim that the use of those rolls is an infringement of his patent. That, I think, is plain enough; for not only did Yaeger & Co. buy these rolls for the express purpose of using them of Downton as well as Allis & Co., but Downton took his proportion of the amount

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paid therefor. Therefore, as respects those rolls, it is too plain for controversy that Downton is estopped.

Now, as to the others purchased by Yaeger & Co., after it is claimed they had notice that a controversy had sprung up between Allis & Co. and Downton, and were put in without Downton's consent, and after notice that, "If you do that, I (Downton) will hold you responsible." If these are the facts, then they went on at their peril.

Now, if the proofs shall show that they made a valid contract for, or bought and paid for, these rolls before they received notice of Downton's rights, then these additional rolls will stand on the same footing as the others; but otherwise not. Another material point argued and to be decided is this: that Downton had disabled himself from maintaining a suit against anybody by reason of the assignment I first read. It being claimed that that was an *assignment* (as distinguished from a license) of his *entire rights* under the patent to Allis & Co., and therefore that he had made an entire unconditional assignment of his rights, and could not bring an action against anybody for invading those rights, which he could have brought had he not made the assignment. So the question is whether this is an assignment of his rights under that process patent:

"In consideration of the sum of \$125, to me in hand paid, I hereby sell, assign, and set over to Edward P. Allis & Co., of Milwaukee, Wis., the exclusive right to manufacture and sell rolls for crushing grain or middlings or other substances."

Now, he had no patent for rolls. He had no more right to make rolls than anybody else in the world. He had a patent for a process.

This is not a suit between Downton and Allis & Co., but a third party, against whom Mr. Downton, as patentee, has brought a suit. He produces his patent, and claims that they have infringed it. They come in and say, "You cannot maintain this suit, because you have assigned *all* your

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rights, under this process patent, to another party, and, if we are liable to any one, we are liable to them, *i. e.*, Allis & Co., and not you." The defendants are setting up this contract as an assignment, and, in my view, in order to enable them to avail themselves of it as such, it must appear on its face to be a complete assignment of Downton's rights; if not, he can maintain this suit if not otherwise equitably estopped. Now, did he by this *instrument assign* his rights under the process patent? He says, "I grant to them the exclusive right to manufacture and sell rolls for crushing grain or middlings, or other substances, . . . which right or process to manufacture and sell rolls is secured to me by said patent." This seems to be based on a mistake from the beginning to the end. It is said, however, by the defendants that he meant to convey something, and you must put a construction on it so as not to defeat the operation of the instrument. But my judgment is, since this does not operate intrinsically or *ex proprio vigore* as an assignment by Downton of his rights under that patent, they remain in him, and will remain in him as against Allis & Co., until Allis & Co. shall secure, by the decree of a court in equity, if thereto entitled, a specific execution of an assignment of the process to them.

In conclusion let me add that I only decide:

1. That the instruments executed by Downton to Allis & Co. do not, nor does either of them, amount to such an assignment of the rights of Downton, as patentee, as to disable him from suing persons generally who infringe his patent, if the same is a valid patent.

2. But whether he can maintain a suit against the purchasers of rolls from Allis & Co., who use the same in such a manner as to infringe his patent, will depend upon the principles of the law of estoppel. Applying these principles, it sufficiently appears that he is estopped as to the first set of rolls; but whether he is estopped as to the others will

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depend upon the special facts and circumstances which will be considered when the cause comes on for final hearing.

Judge Treat does not agree in the above view as to the effect of the assignment and as to estoppel, but that being my view, the case will be disposed of on this point in accordance with the views I have expressed, if it shall turn on them. We have not considered the merits. They will stand for a further argument and hearing.

TREAT, *District Judge*.—Putting a proper construction on these agreements, and taking into consideration the fact that Downton, over his own name, published to the world that whoever bought rolls of Allis & Co. should have the right to use the process, I think there is an estoppel in this case, as Yaeger did buy his rolls of Allis & Co., some of which rolls were put into the mill under Downton's own superintendence.

So far as the contracts and agreements are concerned, standing as they do now, and holding that this contract is designed to convey something, the plaintiff cannot recover, as the right to use is given to any person purchasing rolls of Allis & Co., and these defendants did purchase rolls of Allis & Co. The controversy, primarily, should be between Allis & Co. and Downton, setting up all these matters, as between them, to take out of them or him any pretended right either may have.

But, so far as third persons are concerned, who acted on the faith of Downton's conduct, publications, and the recorded assignment, they cannot be proceeded against for the use of this process. To get rid of any difficulty in this matter, he should proceed directly against Allis & Co. to have the original agreement reformed, so as to correct the mistakes which may be, possibly, detected by looking at the contemporaneous agreements between the parties. In other words, there should have been a suit against Allis & Co. to

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reform the agreements, as between themselves, and having them reformed, sue any one who thereafter might infringe the process.

On the trial, at the proper time, the merits will be considered to determine as to the validity of the process patent.

W. G. Rainey, for complainant.

G. M. Stewart, for respondent.

O'NEIL v. ST. LOUIS, IRON MOUNTAIN & SOUTHERN R'Y CO.

(Eastern District of Missouri. November, 1881.)

1. **PRACTICE — DEMURRER TO EVIDENCE.**—If there is conflicting evidence on which the jury should pass, the court cannot draw to itself the decision of what the evidence or the weight of evidence establishes.
2. **MASTER AND SERVANT — NEGLIGENCE.**—An employer who introduces, without notice to his employee, new and unusual machinery, whether belonging to himself or another, involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident, is liable in damages.
3. **SAME — SAME — PLEADING.**—Where an accident occurs to a railroad employee in consequence of the introduction of a foreign and defectively-constructed car into the train on which he is employed, and he sues the railroad company for damages, he is not bound to allege in his petition that the accident was caused by the introduction of a foreign car.

The plaintiff avers in his petition that, at the time of the accident therein referred to, he was a brakeman in the employment of defendant; that while, in the performance of his duties as such, he was coupling a car, used and operated by defendant at the time, to a certain engine of the defendant, his hand and arm were caught between the car and engine, and crushed and lacerated so that it was necessary to amputate it between the elbow and wrist, and that it was

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amputated; that said injuries were caused by the defective, unsuitable and dangerous apparatus and appliances for coupling said engine and car together; that the dead-woods on said car and engine were insufficient and unstable, and dangerous to plaintiff whilst coupling, by reason of their not keeping said car and engine apart, and allowing the draw-heads of the car and engine to interlap, thereby catching and crushing plaintiff's arm and hand as aforesaid. The plaintiff was ignorant of the dangerous condition of the appliances for coupling said engine and car together, and that neither defendant nor its agents informed him thereof; and that his injuries were caused by the negligence of defendant in supplying him with unsuitable, defective and dangerous appliances with which to work in the discharge of his duty, and without any negligence on his part.

The case came on for trial October 13, 1881. It was tried before a jury, Treat, district judge, presiding. The testimony of witnesses produced on behalf of the plaintiff tended to prove the allegations of the petition. The defendant proved that the car in question did not belong to it, but was a foreign car. At the close of the evidence defendant asked the court to instruct the jury that, under the evidence and pleadings in the case, plaintiff could not recover; but the instruction was refused.

TREAT, *District Judge*, thereupon charged the jury as follows:

Gentlemen of the jury: It is proper, in the consideration of this case, that you should bear in mind the difference in law between the obligation of an employer to an employee, and the obligations of a railroad to a stranger. In the latter case the utmost degree of diligence is required — extraordinary diligence. The case before you involves a few propositions of law in the light of which you should consider the testimony; these propositions being, in the first place, that an employee who undertakes work, though the same may be

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of a dangerous character, is supposed to be competent to the discharge of that duty, assuming for himself all ordinary risks connected therewith; *second*, that the employer, to wit, the railroad company, as in this case, must furnish him with reasonably and adequately safe appliances for the performance of his duties. Railroads, as in the case before you, are bound to receive cars from other roads, to handle them, and to haul them, and a brakeman or other employee of the defendant road is supposed to know that cars of different construction, and, possibly, of different modes of coupling, will be used in the conduct of the business of the railroad company; and the brakeman or other employee, though those cars coming onto the road may be more or less dangerous than the ordinary cars, is supposed to be competent to attend to his business, notwithstanding such cars are used. In other words, this is not a question of comparison between freight cars of the Iron Mountain Railroad, owned by itself, and other cars that it may haul over its road in connection with its respective trains. Behind that rests the main inquiry: Did this defendant road — no matter whether the car was a foreign car — put into its train a car which was not reasonably and adequately safe for the purpose for which it was used, in connection with the duties which the servants had to perform? In other words, though there might be differences in the construction of foreign cars, as compared with the cars belonging to the Iron Mountain Railroad itself; though there might be different degrees of danger connected with the handling of the different cars; yet this defendant was bound that no car, whether its own or a foreign car, should be otherwise than reasonably and adequately safe for its employees to handle and to manage in the ordinary conduct of their business. Consequently the strain in this case seems to be this: Was this car of which you have heard not adequately safe to be put into the train, whereby an employee — a brakeman, for instance, — in undertaking to make the coupling, could not, by the exercise of ordinary care and skill on his

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part, escape accident? Of course, every one engaged in a particular business, employed therefor, is presumed — is bound in law — at his own hazard to exercise ordinary care and diligence with respect to the employment in which he is engaged. He is presumed to be competent therefor; yet, on the other hand, his employer — as a railroad, for instance — is bound on its part to furnish him with reasonably safe and adequate appliances, whereby, in the exercise of ordinary care, he would not encounter accidents of the nature described to you. The case, then, may be narrowed down to this: the plaintiff is entitled to recover, if, exercising ordinary care and diligence in the nature of the employment in which he was engaged, he, through the unreasonably inadequate and unsafe character of the car mentioned, incurred this accident.

If, through this neglect of the defendant company in furnishing such inadequately safe contrivances, without any negligence on his part, he incurred this danger, he is entitled to recover, and the measure of his compensation will be such as in your judgment he ought to receive in consequence of the injury, taking into consideration the nature and extent thereof, where there are no other special damages alleged in the case. On the other hand, if the damage was caused simply by his own negligence or failure to exercise ordinary care in the employment, the nature of which has been described, he cannot recover. If I have made myself understood, this company had the right to haul over its road cars not belonging to it — foreign cars, as they are called. These cars might differ in construction, and might differ in the degree of danger attending their handling or management; yet, if the accident occurs from their being not reasonably safe or adequate, under any circumstances, for the business for which they are employed, and the accident occurs without the negligence of the employee, the company must respond thereto. If, on the other hand, the employee, through his own negligence, meets with an accident growing out of his handling or attempting

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to handle cars that are reasonably and adequately safe, then the accident is at his own cost, for which there would be no redress. Determine then, gentlemen — *first*, was this car reasonably and adequately safe for the employees in the handling of the same. If not, did the plaintiff, through carelessness or negligence, contribute to the accident which he sustained? If the car was not adequately safe, and he was not negligent in performing the duty assigned him, he is entitled to recover. If, on the other hand, the car was adequately safe, and the accident occurred to him through his failure to exercise the proper degree of care in the work in which he was employed, he cannot recover. It is a compound question always, gentlemen — *first*, the neglect of the defendant; *secondly*, the contributory neglect of the plaintiff. Of course, it devolves on the defendant, in cases of this character, if the plaintiff has made out that the car was not adequately safe in respect to the management thereof — I say it is the duty of the defendant to show that the plaintiff's negligence contributed to the accident.

The jury brought in a verdict for the plaintiff. The defendant made a motion for a new trial, and an arrest of judgment, upon which the following opinion was delivered:

T. S. Rudd and A. R. Taylor, for plaintiff.

Thoroughman & Pike, for defendant.

TREAT, *District Judge*.— The plaintiff sued the defendant for damages caused by the alleged negligence of the defendant. A trial was had, and verdict rendered for plaintiff. The defendant has filed motions for new trial and in arrest. The plaintiff was an employee of the defendant, and the accident occurred while he was engaged in the scope of his employment, viz., as brakeman, in coupling cars on a freight train. The evidence at the trial was conflicting. It seems that the defendant railway, in the discharge of its duties, was accus-

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tomed to receive, couple, and haul on its trains cars belonging to other railroads whose bumpers or dead-woods and coupling appliances were different from its own; but that a "foreign car" of the Pa. R. R., of peculiar construction as to its dead-wood and couplings, was seldom received and placed in defendant's trains. "Foreign cars," sent forward by the Pa. R. R. road, differing from defendant's cars, yet differing from those of the Pa. R. R., were frequently hauled over the defendant road as part of the latter's trains. It was evident from the testimony that different degrees of danger to operatives existed when one or the other of such foreign cars was used, and the testimony was in conflict as to which the foreign car was, which was introduced into the train in question.

At the close of the evidence defendant demurred, on the ground that the case, as fully presented, did not establish plaintiff's right to recover. It is admitted that, even at the close of evidence offered on both sides, the court can instruct the jury that the plaintiff cannot recover; yet if there is conflicting evidence on which the jury should pass, the court cannot draw to itself the decision of what the evidence or the weight of evidence establishes. If this were not so the court would usurp the province of the jury.

It is contended in arrest that while the petition sets out with particularity the circumstances under which the accident occurred, it failed to state that the car in question was a "foreign car." The averment is that "while plaintiff, etc., was coupling a *certain* car, used," etc., the accident happened "through the negligence of the defendant in supplying to plaintiff said car, defectively and improperly constructed, and in failing to inform plaintiff of the improper construction of said car; that said car was constructed in an unusual and improper manner, in that the dead-woods extended out too far, so as to render the work of coupling the engine to said car extremely dangerous," etc.. The petition further alleges

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the unusually dangerous condition of the train from placing therein such a car without notice to the employee, etc.

If this court accepts as a rule of pleading the views expressed in *Leduke v. St. Louis & Iron Mountain R. Co.* 4 Mo. App. 491, still this case would not fall within its purview. The plaintiff was not bound to aver that the accident was caused by the introduction of a "foreign car" into the train; and still further, if such a fact became material on the trial of the cause, the rules as to variance would have prevailed, and the doctrine of jeofails after verdict.

The law as to employer and employee in such cases, laid down by this court at the trial, was the same as declared by the United States supreme court, and was given in the precise language of that court; yet to avoid misapprehension by the jury, the doctrines stated by Judge Cooley in *Mich. Cent. R. Co. v. Smithson*, 7 N. W. Rep. 791, were repeated and amplified. Still it is contended that, in the light of the rulings in *Porter v. Hannibal & St. Joe Railroad*, 71 Mo. 68, this court omitted to charge that the plaintiff was entitled to recover if he could not have known of the danger by the exercise of proper care, however defective the appliances may have been. A careful examination of the latter case shows that it contains only well-established doctrines, which, if applied to this case, would lead to the same result already reached.

It is of great importance to hold employees on railroad trains to the fullest measure of duty, for on their skill and fidelity life and property depend; and it is equally important for their protection that their employers shall furnish them with reasonably adequate and safe appliances whereby they can perform their duties with safety to themselves and to the lives and property at stake. To relax the rules so that the employer may escape liability, would be as detrimental to public interests as if the rules by which the employee is to be governed were to be relaxed in favor of the latter. An employee, as charged in this case, must be supposed to know the nature of the employment, and to possess the skill and dili-

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gence requisite for the proper discharge of his duties. He takes the hazard of the employment. Still, if the employer introduces, without notice to the employee, some new and unusual machinery involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident like that in question, it is not unreasonable to hold that the employer should answer therefor in damages.

Both motions are overruled.

NOTE.¹ — MASTER'S LIABILITY TO SERVANT — GENERAL RULE. — That a servant cannot hold his master responsible for injuries resulting from the negligence of fellow-servants, because this is a risk he has assumed, has remained the rule of law in England ever since the case of *Priestley v. Fowler*, 3 Mees. & W. 1; and the leading case of *Farwell v. Boston, etc. R. Co.* 4 Met. 49, announcing the same rule, has been followed without dissent in this country. But the responsibility of one person to another, for the consequence of personal negligence, is not lessened by the existence of the relation of master and servant. Said McCrary, C. J., in the late case of *McMahon v. Henning*, 1 McC. 516, arising upon facts like those of the principal case: "The true doctrine of the common law is that the master is liable to his servants, as much as to any one else, for the consequences of *his own* negligence; and it is no defense for him to show that the negligence of a fellow-servant contributed to bringing about the injury." Such personal negligence of the master may consist either in the failure to employ fit and competent servants, or to furnish suitable and safe machinery, structures, appliances, and materials for their use.

MASTER'S DUTY IN SELECTION OF MACHINERY. — In the selection of machinery, etc., it is the duty of the master to use reasonable or ordinary care, and this care he must exercise, both in procuring and maintaining sound and safe structures and appliances. If he knows, or in the exercise of due care might have known, that they are unsafe or insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty. *Gilman v. Eastern R. Co.* 13 Allen, 440; *Bartonshill Coal Co. v. Reid*, 3 Macq. 266; *Noyes v. Smith*, 28 Vt. 59; *Sullivan v. Louisville Bridge Co.* 9 Bush, 81; *Kansas, etc. R. Co. v. Little*, 19 Kan. 269; *Lewis v. St. Louis, etc. R. Co.* 59 Mo. 495; *Mad River R. Co. v. Barber*, 5 Ohio St. 541. The master is equally chargeable, whether the negligence was in originally failing to provide or in

¹ From *Federal Reporter*.

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afterwards failing to keep the machinery in safe condition. *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Shanny v. Androscoggin Mills*, 66 Me. 420; *O'Donnell v. Allegheny, etc. R. Co.* 59 Pa. St. 289; *Chicago, etc. R. Co. v. Swett*, 45 Ill. 197; *Cooper v. Central, etc. R. Co.* 44 Iowa, 134.

"ORDINARY CARE"—WARRANTY OF SOUNDNESS—BEST AND SAFEST MACHINERY.—What will be ordinary care depends on the nature of the business, its extent, degree of hazard involved, and all the circumstances of the case. Said Thomas, J., in *Cayzer v. Taylor*, 10 Gray, at page 280: "What is ordinary care cannot be determined abstractly. It has relation to and must be measured by the work or thing done, and the instrumentalities used, and their capacity for evil as well as good. What would be ordinary care in one case may be gross negligence in another. We look to the work, its difficulties, dangers and responsibilities, and then say, what would and should a reasonable and prudent man do in such an exigency?"

The law does not exact from the master the exercise of the highest degree of diligence in supplying safe machinery for the use of the servant; ordinary care is sufficient. *Cooper v. Central, etc. R. Co.* 44 Iowa, 134; *Nolan v. Shickle*, 3 Mo. App. at page 807; *Patterson v. Wallace*, 1 Macq. 748; *Holden v. Fitchburg R. Co.* 129 Mass. at page 277. But see *Toledo, etc. R. Co. v. Conroy*, 68 Ill. 560, holding a railroad corporation bound to exercise the highest degree of care in the construction of its road and bridges, and that ordinary prudence in such case was not sufficient.

There is no implied *warranty* in the contract of service that the machinery or materials furnished shall be sound or fit for service, nor that the servant shall not be exposed to extraordinary risks. *Heyer v. Salisbury*, 7 Bradw. (Ill. App.) 93. The master does not guarantee the soundness of the machinery, nor insure the servant against accidents, and if the latter suffers injury from latent defects unknown to the master and not discoverable in the exercise of ordinary diligence, the master is not responsible. *Fifield v. Northern R. Co.* 42 N. H. 225; *Ormond v. Holland*, El. Bl. & El. 102; *L. R. & F. S. R'y Co. v. Duffey*, 35 Ark. 602; *Galveston, etc. R. Co. v. Delahunty*, 53 Tex. 206; *Flynn v. Beebe*, 98 Mass. 585; *Ladd v. New Bedford R. Co.* 119 Mass. 412; *Gibson v. Pacific R. Co.* 46 Mo. 163.

The master is not bound to use only the safest and best machinery. That is, aside from the legal effect of the servant's knowledge of the risk, it is not negligence *per se* in the master to continue the use of machinery or materials known by him to be less safe than other machinery or materials he might use for the same purpose. Thus, in *Wonder v. Baltimore, etc. R. Co.* 32 Md. 411, where it was shown that the plaintiff, a brakeman, would not have been injured had a certain improved brake been used, the court said: "A master is not bound to change his ma-

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chinery in order to apply every new invention or supposed improvement in appliances, and he may even have in use a machine or an appliance for its operation shown to be less safe than another in general use, without being liable to his servants for the consequences of the use of it." *Michigan C. R. Co. v. Smithson*, 7 N. W. Rep. 791; *Hayden v. Smithville Manuf'g Co.* 29 Conn. 548; *Fort Wayne, etc. R. Co. v. Gildersleeve*, 33 Mich. 133; *Smith v. St. Louis, etc. R. Co.* 69 Mo. 82; *Cooper v. Central R. Co.* 44 Iowa, 134. On the other hand, it was held in *St. Louis, etc. R. Co. v. Valirius*, 56 Ind. 511, that it was negligence in a railway company to use cars dangerous in construction when it could procure others not dangerous, and that it must procure the best or be held responsible. See, also, *Dorsey v. Phillips & Colby Construction Co.* 42 Wis. 583, at page 597; *Toledo, etc. R. Co. v. Asbury*, 84 Ill. 429.

DELEGATION OF MASTER'S DUTY TO AGENT OR SERVANT—SERVANT'S NEGLIGENCE IMPUTABLE TO THE MASTER.—Where an employer attends personally to the supply and repair of the machinery, the question for the jury is, did he exercise reasonable care in the performance of his duty to the servant to select sound and suitable machinery, and to keep the same in repair? When the employer does not do this in person, but, as is often the case with individuals, and always the case with corporations, delegates the duty of selecting and repairing the machinery to his agent or servant, what is the question for the jury in this case? Does the question become, as maintained by some text-writers, did the master exercise reasonable care in the selection of the *servant* to whom he delegated the duty of selecting and repairing the machinery? Said Lord Cairns in *Wilson v. Merry*, L. R. 1 Sc. App. 326: "But what the master is, in my opinion, bound to his servant to do, in the event of his not personally superintending and directing the work, is to select proper and competent persons to do so, and to furnish them with adequate materials and resources for the work. When he has done this he has, in my opinion, done all that he is bound to do. And if the persons so selected are guilty of negligence, this is not the negligence of the master." If such is the true rule of law, then corporations could seldom be held responsible for injuries to employees from defective machinery; and, in the language of Byles, J., in *Clarke v. Holmes*, 7 H. & N. 937, "the more a master neglects his business and abandons it to others the less will he be liable."

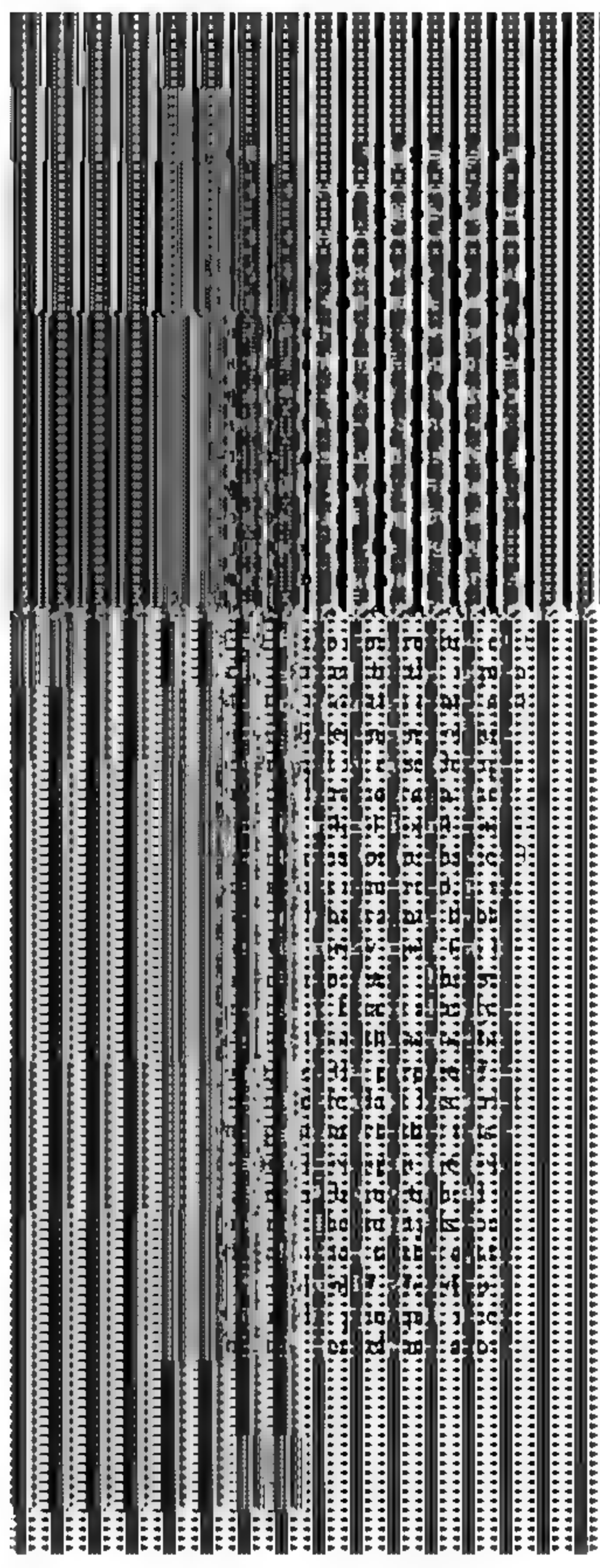
Does not the question for the jury remain the same, whether the master attends personally to the supply and repair of the machinery or appoints others to do it? Did he exercise due care in supplying the *machinery*? It is well settled that the duty of the master to use due care in the selection of competent servants is not *necessarily* discharged by the appointment of a competent agent to select the servants, and it is difficult to see why the same rule does not apply in the selection of ma-

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chinery. *Flike v. Boston, etc. R. Co.* 53 N. Y. 549, Church, C. J., at page 553; *Quincy Mining Co. v. Kitts*, 42 Mich. 84. It may be due care on the part of the master to delegate the duty of attending to the supply and repair of machinery to a competent agent; it might be gross negligence in him to attempt to do it himself. "But he is bound to use reasonable care, having regard to the nature of the business and the circumstances of the case, to secure their safety and sufficiency." *Holden v. Fitchburg R. Co.* 129 Mass. 268.

"We understand," say the court, in *Fuller v. Jewett*, 80 N. Y. 46, "that acts which the master, as such, is bound to perform for the safety and protection of his employees cannot be delegated so as to exonerate the former from liability to a servant who is injured by the omission to perform the act or duty, or by its negligent performance, whether the nonfeasance or misfeasance is that of a superior officer, agent or servant, or of a subordinate or inferior agent or servant to whom the doing of the act or the performance of the duty has been committed. In either case, in respect to such act or duty, the servant who undertakes or omits to perform it is the representative of the master, and not a mere co-servant with the one who sustains the injury." And the court held that the duty of maintaining machinery in proper repair devolved upon the master, and he was liable for injuries resulting from a failure to perform it. "The master cannot delegate his duty to select competent servants and safe machinery to another. He must use reasonable care in performing these acts. . . . If the immediate negligence in these cases is that of an agent or servant, and a co-servant is injured thereby, the law imputes the negligence to the master, and the master is liable the same as if the injury had been sustained by a stranger." *Booth v. Boston, etc. R. Co.* 73 N. Y. 38.

Every railroad operator owes to his employees a duty to furnish machinery adequate and proper for the use to which it is to be applied, and to maintain it in like condition, and he is liable for injuries resulting from failure to perform this duty, whether the act was due to personal neglect or the neglect of an agent employed by him. *Kain v. Smith*, 80 N. Y. 458; *Kirkpatrick v. N. Y. Central R. Co.* 79 N. Y. 240. And this is the law of Massachusetts. In *Gilman v. Eastern R. Co.* 13 Allen, 440, the court say: "He [the master] cannot divest himself of his duty to have suitable instruments of any kind by delegating to an agent their employment or selection, their superintendence or repair. A corporation must, and a master who has an extensive business often does, perform this duty through officers or superintendents; but the duty is his, and not merely theirs, and for negligence of his duty in this respect he is responsible." Said Gray, C. J., in *Coombs v. New Bedford Cordage Co.* 102 Mass. 572: "The duty of providing suitable machinery to carry on their business, and a suitable place for the plaintiff to



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work in, including giving him full notice of the nature of the risks attending the service, was a responsibility resting upon the defendants [employers], which they could not throw off by delegating it to a foreman or to other workmen." This has been declared to be the law in a large number of cases. *Hough v. Pacific R'y Co.* 100 U. S. 213; *Flike v. Boston, etc. R. Co.* 53 N. Y. 549; *Laning v. N. Y. Cent. R. Co.* 49 N. Y. 521; *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Holden v. Fitchburg R. Co.* 129 Mass. 268; *Arkerson v. Dennison*, 117 Mass. 407; *Drymala v. Thompson*, 26 Minn. 40; *Wedgwood v. Chicago, etc. R. Co.* 41 Wis. 478; S. C. 44 Wis. 44; *Shanny v. Androscoggin Mills*, 66 Me. 420; *Mullan v. Phil. S. Co.* 78 Pa. St. 25; *O'Donnell v. Allegheny, etc. R. Co.* 59 Pa. St. 239; *Chicago, etc. R. Co. v. Swett*, 45 Ill. 197; *Lewis v. St. Louis, etc. R. Co.* 59 Mo. 495; *Kansas, etc. R. Co. v. Little*, 19 Kan. 269; *Berea Stone Co. v. Kraft*, 31 Ohio St. 287. Thus, in *Toledo, etc. R. Co. v. Conroy*, 68 Ill. 560, where a servant of the company was injured in consequence of the giving way of a wooden bridge, which had become defective through age and exposure to the weather, it was held that the company could not escape liability by showing that the bridge was properly constructed in the first place, and that it employed skillful and competent subordinates to inspect and repair its bridges. The same rule applies to the individual employer as well as to corporations. *Corcoran v. Holbrook*, 59 N. Y. 517.

But there are authorities which hold that the duty of the master is discharged by the employment of competent agents or servants to furnish the machinery and attend to repairs, and that if a servant is injured through the failure of the persons so appointed to make repairs, it is the negligence of a fellow-servant, and the master is not liable. *Columbus, etc. R. Co. v. Arnold*, 81 Ind. 174; *Wonder v. Baltimore, etc. R. Co.* 32 Md. 411; *Hanrathy v. Northern, etc. R. Co.* 46 Md. 280; *Harrison v. Central R. Co.* 31 N. J. L. 293.

CONTRIBUTORY NEGLIGENCE OF FELLOW-SERVANT.—If the master is himself negligent, and the negligence of a fellow-servant of the injured contributes to the accident, this does not exempt the master from liability; it is only the negligence of the injured servant that will have that effect. Thus, in *Paulmier v. Erie R. Co.* 34 N. J. L. 151, where the company negligently allowed the erection of an unsafe trestle-work for the track, and gave the engineer in charge orders not to run his engine thereon, but he disobeyed, and the plaintiff's intestate, a fireman, who was unaware of the orders or of the danger, was thereby killed, the trestle-work giving way, the company were held liable. If a servant is injured in part by the negligence of the master and in part by the negligence of a fellow-servant, he may recover of the master. *McMahon v. Henning*, 1 McC. 516; *Cone v. Delaware, etc. R. Co.* 81 N. Y. 206; *Booth v. Boston, etc. R. Co.* 78 N. Y. 88; *Crutchfield v. Richmond, etc. R. Co.* 76 N. C. 320.

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LATENT DEFECTS IN MACHINERY—DUTY OF MASTER TO INFORM SERVANT.—As before stated, the master may, if he so chooses, supply unsafe machinery. “Every manufacturer has the right to choose the machinery to be used in his business, and to conduct that business in the manner most agreeable to himself, provided he does not thereby violate the law of the land.” *Hayden v. Smithville Manuf'g Co.* 29 Conn. 548. If the defect or danger is latent, and either known to the master, or of such a character that in the exercise of ordinary care he ought to have known it, it is the duty of the master to inform the servant of its existence. He must either use machinery free from latent dangers, or inform his servant of the existence of such as he either knows or ought to know. *Smith v. Oxford Iron Co.* 42 N. J. L. 467; *Sowden v. Idaho Mining Co.* 55 Cal. 443; *Wedgwood v. Chicago, etc. R. Co.* 41 Wis. 478; S. C. 44 Wis. 44; *Cummings v. Collins*, 61 Mo. 520; *Gibson v. Pacific R. Co.* 46 Mo. 163; *Fairbank v. Haentzche*, 73 Ill. 237; *Paulmier v. Erie R'y Co.* 84 N. J. L. 151; *Walsh v. Peet Valve Co.* 110 Mass. 23; *Spelman v. Fisher Iron Co.* 56 Barb. 151.

In *Smith v. Oxford Iron Co. supra*, the defendant company introduced into use in its mine a new blasting powder known by its president to be a much more dangerous explosive than the powder before in use. It was held that it was the duty of the company to have informed the plaintiff, a miner, of the danger, and of the proper manner of using the powder; and, not having done so, it was liable to him for injuries sustained while using it. But while the master must use ordinary care to provide reasonably safe and fit appliances and structures for the use of the servant, yet he is not bound to provide against the danger arising from the unnecessary use of such appliances and structures for purposes to which the same are not adapted and designed. *Chicago, etc. R. Co. v. Abend*, 7 Bradw. (Ill.) 180; *Felch v. Allen*, 98 Mass. 572; *Durgin v. Munson*, 9 Allen, 396.

RIGHT OF MASTER TO CONTRACT WITH SERVANT FOR EXEMPTION FROM LIABILITY.—The question of the right of the master, by an express stipulation in the contract of hiring, to exempt himself from all liability to his servants for the consequences of failure to perform his duty of supplying sound machinery and competent servants, is not settled by the authorities. It would seem, however, that the same public policy that will not allow a common carrier to contract for exemption from the consequences of his negligence, would forbid such contracts between master and servant, especially when their inequality of position is considered. Said Crompton, J., in *Clark v. Holmes*, 7 H. & N. 937: “It cannot be made part of the contract that the master shall not be liable for his own negligence.” And in *Harrison v. Central R. Co.* 81 N. J. L. 293, the court say: “The claim to such exemption is inconsistent with morality and public policy; so much so, indeed, that it might be

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somewhat questionable whether, if such contract existed in point of fact, and by express stipulation, it would not be on that account void."

There are but two cases that have come to our notice in which this question has been decided: In *Western & Atlantic R. Co. v. Bishop*, 50 Ga. 465, it was held that such a contract was valid, although it may be noticed that it was not necessary to the decision, the plaintiff having been guilty of contributory negligence; and the court further express the opinion that the employer would be liable for utter recklessness or gross negligence, notwithstanding such contract. In a recent case decided in the United States circuit court for the district of Indiana (*Roesner v. Hermann*, 8 Fed. Rep. 782), Gresham, D. J., delivered an oral opinion holding that a contract between employer and employee, whereby the employee, in consideration of the employment, agrees to release and discharge his employer from all damages on account of accident or death to the employee caused by the negligence of his employer or co-employees, is void as against public policy.

W. E. BENJAMIN.

OVERTON, Trustee, v. MEMPHIS & LITTLE ROCK R. Co. as reorganized.

(*Eastern District of Arkansas. March, 1882.*)

1. EQUITY — RELIEF, WHEN REFUSED — DISPUTED EQUITABLE CLAIM.— Where the relief sought is founded upon a disputed equity, a court of equity will with great reluctance and hesitation take the possession from a defendant holding a clear legal title. So, where none of the actual holders of the stock or bonds of a railroad company who would be affected similarly with the plaintiff were before the court, the court ought to hesitate before appointing a receiver, on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock.
2. SAME — RECEIVER, WHEN NOT APPOINTED.— It is not the province of a court of equity to take possession of the property and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding.

In a cause pending in the supreme court of Arkansas, on appeal from the chancery court of Pulaski county, wherein

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the state was complainant and the above-named railroad company (as intervenor) was defendant, that court decreed foreclosure of a mortgage executed by a former company, owner at the time of the road, and ordered a sale of the road and rolling stock. Four days after this decree was rendered, complainant filed in this court his bill claiming to be entitled to some deferred stock of the railroad company, and praying the court to compel issue thereof. The company disputed his right to such deferred stock. Afterwards complainant filed an amendment to his bill, setting up the judgment of the supreme court and decree for sale of the road; the rapid approach of the day of sale; that the officers of the defendant company were taking no steps to prevent a sale; alleging his inability to raise the large sum required to pay the judgment; averring that he was informed and believed that certain holders of the bonds of the defendant railroad company would raise the money "if they could be assured of repayment by reception of the income of the property," and praying the appointment of a receiver with power to borrow the money, pledging the income of the road to pay the judgment.

T. B. Turley and *U. M. & G. B. Rose*, for complainant.

B. C. Brown, for defendant.

CALDWELL, *District Judge*.—1. The plaintiff is not the legal owner or holder of any of the stock or securities of the defendant company. He claims in his bill to be equitably entitled to \$1,500,000 of deferred stock, but his right to this is disputed by the company.

"Where the relief sought is founded upon a disputed equity, a court of chancery will with great reluctance and hesitation take the possession from a defendant holding the clear legal title." *Schenck v. Peay*, 1 Woolw. 175.

Not one of the actual holders of the stock or bonds of the

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company, who would be affected similarly with the plaintiff by a sale of the road under the decree, are before the court. In view of this fact the court ought to hesitate before appointing a receiver on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock.

2. While the bill alleges the trustee is unable to raise the money to provide for the decree "on his own account," it does not allege that his *cestui que trust* cannot do so. And it does allege "that the bondholders of said road and others interested therein, as he is informed and believes, would and will advance the money to provide for said decree, if they had any assurance that it would be refunded to them out of the earnings of the road." No order of this court, in advance, is necessary to give this assurance, or for the protection of such of the holders of the stock and securities of the company as may provide the money to pay the decree or purchase the property at the sale. Upon payment of the decree they are entitled to be reimbursed their money, and, to this end, to be subrogated to all the rights of the state under the decree, or, upon a purchase, they are entitled to all that a sale under the decree can impart, including the right to the immediate possession, and, of course, the right to receive the earnings of the road, as against all junior incumbrancers, until they are reimbursed, and a receiver of this court would have no greater powers.

3. Suppose the receiver to be appointed and the proceeding to run its course, as contemplated in the bill, it is quite obvious the court would be burdened with the administration of the business affairs of the company for a long period. Undoubtedly there are cases in which a court of equity may, through its receiver, take possession and control of the business of corporations and individuals. But it is a jurisdiction to be sparingly exercised. None of the prerogatives of a court of equity have been pushed to such extreme limits as this, and there is none so likely to lead to

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abuses. It is not the province of a court of equity to take possession of the property, and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding. If, as in this case, the loss or danger can be averted by the lawful action of the suitor, or those he represents, he cannot successfully invoke the exercise of the extraordinary powers of a court of equity, because that course would be more agreeable or convenient. Should the plaintiff, or those he represents, pay off the decree, or purchase under it, the rights and equities thus acquired will be clear, and within the protection of a court of equity.

4. The danger that all holders of stock or securities junior to the lien of the decree will be cut off by a "stranger, or third party," purchasing at the sale, is too slight to be seriously considered. The disproportion between the value of the property and the amount of the decree precludes the idea of any one being permitted to purchase the property discharged from a trust in favor of the stock and bondholders. It is the duty of the directory to protect the interests of the stockholders of the company, and they are not likely to incur the liability that a neglect of that duty would impose. But should they do so, it is, as we have seen, within the power of the plaintiff, and other parties in interest, to protect themselves against loss by reason of the fraud or neglect of the directory. And, if the decree is not satisfied, and the property goes to sale, it is as certain as any future event can be, that it will be purchased by or for the company, or by or for some one or more of the stock or bondholders, whose relations to the company and the other stockholders will be such that they will take the property charged with a trust in favor of the latter.

Motion for receiver denied.

In re Bignall, Bankrupt.

*In re BIGNALL, Bankrupt.**(Eastern District of Missouri. November, 1881.)*

1. **BANKRUPTCY — ATTORNEY'S FEES — ACT OF 1875 — GENERAL ORDER OF THE SUPREME COURT.**— An attorney's fee of \$30 is all that can be allowed for obtaining an involuntary adjudication in bankruptcy.
2. **SAME—SAME.**— Where the assignee of a bankrupt had made an agreement with attorneys whereby they were to prosecute certain cases, and were to receive, if successful, such sum for their services as the court might allow, and they had thereupon instituted suits, gone to some expense and great trouble, and recovered large sums which otherwise would have been lost to the creditors of the bankrupt, an allowance of twenty per cent. upon the amounts recovered held reasonable.

In bankruptcy. Petition for counsel fees.

The question here arose upon two petitions of the firm of Taylor & Pollard, attorneys at law, asking for the allowance of certain fees, and the report of the register in bankruptcy, to whom the matter was referred. The register decided that said firm were entitled to a fee of \$750 for services as attorneys, on behalf of the petitioning creditors, in obtaining the adjudication of M. C. Bignall, as a bankrupt, and to twenty per cent. of the amounts recovered in the suits referred to in the opinion of the court, and so reported. The register's report was excepted to by the Gould Manufacturing Company and S. B. Gould, creditors, who had sought to obtain a fraudulent preference by buying up claims against the bankrupt's estate.

George M. Stewart, for petitioners.

J. M. & C. H. Krum, for excepting creditors.

TREAT, District Judge.—I have considered the exceptions to the register's report in this case, and as the attorneys were anxious to have the matter determined before three o'clock to-day, I shall announce my conclusions. The attorneys for the petitioning creditors asked for an allowance in the matter,

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for their services, of the sum of \$1,000. The register, under all the facts and circumstances of the case, allowed the attorneys what he considered a reasonable sum, namely, the sum of \$750. It is said, from the facts appearing with regard to the matter, that but for the proceedings in bankruptcy the creditors would have practically received nothing. The supreme court of the United States, under the general orders in bankruptcy, especially Nos. 3 and 39, tried to restrict these matters, so far as a petitioning creditor was concerned, to the ordinary taxable costs in the courts, as stated in the general order, as "in cases of equity." The practice of the district courts had been otherwise. They held that where some creditors proceeded against an estate, and spent money for the benefit of the creditors generally, the general fund ought to be amenable for the result, inasmuch as all the creditors would share in the benefits of the controversy. But the supreme court of the United States, under the act of 1875, concluded to stop that. The exceptions as to that allowance by the register will, therefore, be sustained, except as to the sum of \$20, which is the taxable fee.

Now, as to the other matter, what is properly allowable? It seems that the assignee in this case — the original assignee and his successor, the original assignee having resigned — made an agreement with the attorneys in this matter whereby they might pursue this litigation, and recover, if possible, the amounts in dispute — they to receive, if successful, such sum as the court might deem fair compensation for them. No sum was specified. Litigation ensued. The attorneys had to bear certain expenses in the northern district of New York, and had to go backward and forward in the investigation of the same. The result was that they recovered the sum of seventeen thousand and odd dollars in one suit, and in another direction, where there was less labor and trouble, they recovered the sum of \$5,300. Now, what is a fair compensation under the circumstances? We have the opinions of a great many of the attorneys of the bar with regard to such

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matters. The register reports that he thinks this court ought to follow the precedent of the bar, which I think is more honored in the breach than in the observance. I think that the best interests as well as the ethics of the profession require that attorneys shall not do that which was denounced by the common law—speculate in the trial of causes. I have no sympathy for any rule which permits such practice. The parties in the case, or rather the assignee, should have applied to the court for permission to enter into a contract. Nothing of the kind was done. The services, however, have been performed and the money recovered. The party objecting to the allowance in this matter occupies a peculiar relation. I am sorry his attorney is not here. Nearly all the funds of this bankrupt estate would have been absorbed through the instrumentality of this particular party. Being pursued in the United States courts by the assignee on account of the matter, he bought up all the accounts. After a fierce litigation for over a year, having bought up these claims and finding he must at last meet the result of the litigation, to wit, a judgment for the entire amount received through his fraudulent contrivances, he now comes in and objects to an allowance of anything in the way of fees for the services which compelled him to answer for the fraud perpetrated on all the creditors generally. The case is peculiar in that aspect, and I mention it merely that this action shall not be considered as a precedent in these matters. The circumstances of this case and its peculiar character must be considered, together with the fact that the party objecting is a fraudulent creditor, who was pursued to the point where he had to surrender to a judgment, in the mean time buying up claims, and finally making a compromise, which, for a long time, I hesitated to permit. He wishes to come in here as a creditor under the bankrupt act, and share in the dividends under these contrivances. As stated by himself, in the argument, he has nineteen-twentieths of the claims, and wishes to avoid paying any expenses. Without indorsing

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the mode of proceeding with regard to the matter, I merely hold that under the special circumstances of this case the report of the register as to this allowance will be affirmed; or, to put it in precise form, the exceptions thereto will be overruled.

As to the allowance under the general orders in bankruptcy, in consequence of the act of 1875 the sum of \$750 will be reduced to \$20.

As to the other amount, ordinarily, I would not allow it; but when a party comes in who is guilty of fraud and asks that he may take nineteen-twentieths of the estate, and objects to an allowance for the very services which compelled him to disgorge, I do not think he stands in a very favorable attitude towards the court.

VAN HOVEN v. IRISH.

(District of Minnesota. January, 1882.)

1. **CONTRACT MADE ON SUNDAY—AFFIRMANCE ON A WEEK DAY.—**
Affirmance on a week day of a contract of bargain and sale entered into on Sunday, and void for that reason, makes it valid.

The plaintiff and defendant, on May 8, 1880, entered into a contract for the sale and delivery of cattle, and \$100 was paid the defendant on the contract. Subsequently this contract was rescinded, and another one entered into, varying somewhat in its terms, and the \$100 retained by defendant as part performance. The defendant claims this latter contract was made on Sunday and is void. The plaintiff brings this action to recover damages for a failure to perform a contract alleged to have been made on July 6th, a week day, which is substantially the contract claimed by defendant to have been made on Sunday. The defendant denies that any other contract was made except the one on Sunday. The case was tried by a jury, and verdict rendered for the plaintiff. A motion for a new trial is made by the defendant.

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W. P. Warner, for plaintiff.

Lamprey & James, for defendant.

NELSON, *District Judge*.—Two vital questions were submitted for the determination of the jury:

(1) Was the contract, for breach of which damages are claimed, entered into on Sunday?

(2) If the contract was entered into on Sunday, and void by the laws of Minnesota, was it afterwards reaffirmed on a week day?

The court stated to the jury "that by the laws of Minnesota contracts of a secular character, and which are not works of necessity and charity, if finally consummated on Sunday, are void, and no action can be maintained, either on the contract or for the recovery of whatever may have been done under the contract;" also, "that contracts entered into on Sunday could be reaffirmed afterwards." The case was fairly put to the jury, and the two controlling issues left for them to pass upon.

The counsel for the defendant presented several instructions and requested the court to embrace them in its charge to the jury. They were all, with two exceptions, given in the language of counsel. The language of the other two was changed so as to permit the jury to consider and determine whether the evidence showed a reaffirmance on a week day of the contract, in case they should find the agreement was first entered into on Sunday. The court also instructed the jury that the delivery of the cattle was evidence to be considered by them, tending to show reaffirmance, as claimed by the plaintiff. Counsel in his brief states that defendant testified that the cattle were delivered under no contract. He is mistaken. The defendant testified that he delivered the cattle under a contract made Sunday, July 4th.

The Vermont supreme court and the later authorities sustain the view taken in respect of the reaffirmance of Sunday contracts, in order, as said by Judge Redfield, to secure par-

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ties from fraud and overreaching practiced on Sunday by those who know their contracts are void and cannot be enforced. *Adams v. Gay*, 19 Vt. 358; *Harrison v. Colton*, 31 Iowa, 16. In this case the evidence showed that the quality of cattle delivered by the defendant was inferior, and not up to the average of the herd he had contracted to deliver.

If the jury had determined the contract was completed and final on Sunday, and there had been no subsequent legal reaffirmance, the law would leave the plaintiff to suffer from his own wrong, and would not aid him; but if the jury came to the conclusion from the evidence that the contract had been reaffirmed on a subsequent week day, it became valid from the date of the reaffirmance, and plaintiff was entitled to recover damages for a breach. His success in such case does not depend on his own violation of law.

The jury sustained the latter view of the case. *Durant v. Rhener*, 26 Minn. 362, does not touch one vital point upon which this case turned, provided the jury came to the conclusion that the contract was affirmed on a week day. In the opinion of the supreme court in that case the conclusion of the referee did not agree with his finding of facts, and the facts as he found them showed in its opinion the agreement was entered into on Sunday, and was so considered by both parties.

There was no evidence in that case tending to show a reaffirmance of the contract by the parties on a subsequent day. The evidence clearly established "the agreement for the formation of a partnership, then and there," on Sunday.

The evidence here tended to show a reaffirmance, and justified the verdict of the jury. Motion denied.

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CISSELL v. PULASKI COUNTY.

(*Eastern District of Arkansas. October, 1881.*)

1. COUNTY WARRANTS — CANCELLATION — NOTICE REQUIRED. — The notice required to be given of the order of the county court calling in warrants for cancellation and reissue, under a statute, in Arkansas, is for the benefit of the warrant holders; and the county, which is suitor in the proceeding, cannot object that legal notice of such call was not given.
2. NOTICE — PUBLICATION, HOW PROVED — AFFIDAVIT. — The affidavit to prove the publication of a legal notice in judicial proceedings, must show that the paper in which the publication was made is one authorized to publish such notices, and that the affiant sustains the relation to the paper required by the statute to authorize him to make the affidavit.
3. SAME — CONSTRUCTIVE SERVICE — FACTS MUST AFFIRMATIVELY APPEAR. — When it is sought to conclude a party by constructive service, by publication, every fact necessary to the exercise of jurisdiction, based on such service, must affirmatively appear in the mode prescribed by the statute.
4. SAME — DEFECTIVE PROOF CANNOT BE SUPPLIED BY PAROL TESTIMONY. — If the proof of publication contained in the record is defective, it is not competent for another court to receive parol testimony to supply the omission.
5. SAME — RECORD EVIDENCE OF NOTICE — PRESUMPTIONS. — The recital of due notice in the record of a proceeding, under special statutory authority, must be read in connection with that part of the record which gives the official evidence prescribed by statute. No presumption will be allowed that other or different evidence was produced; and, if the evidence in the record will not justify the recital, it will be disregarded.

A statute in Arkansas authorizes the county court at stated periods to call in all the outstanding warrants of the county "in order to redeem, cancel, reissue, or classify the same." An order for the call is required to be made by the county court, and notice of the time fixed for the presentation of warrants under the call must be given in a mode provided by the *act*, and all warrants not presented at or before that time are barred. The plaintiff sued on warrants of the defendant county reissued under a call in 1875. The county

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answered (1) that there was no sufficient notice of the call of 1875, and that the reissue of the warrants by the county court under the supposed call of that year was illegal and void; and (2) that a valid call was made in 1877, and the warrants in suit were not presented under that call as required by law and the order of the county court, and were therefore barred.

John McClure, for plaintiff.

B. C. Brown, for defendant.

CALDWELL, *District Judge*.—1. It is not material to inquire into the regularity of the order for the call of 1875, or the sufficiency of the notice. The county court had jurisdiction to adjudicate upon the validity of the warrants, if the holder submitted himself to its jurisdiction for that purpose, whether the order for the call and notice were valid or not. The object of the order for the call and of giving notice is to acquire jurisdiction over and bind those who do not voluntarily submit their warrants for examination and adjudication. The county court has jurisdiction to pass upon the validity of a warrant or any other claim against the county at any time it may be presented to it by the holder. Section 595 (sixth subdivision) and section 611, Gantt's Digest. And when it invites holders to present their warrants and they do so, and the court acts upon them, and there is no appeal taken from its judgment, the action is as binding in all respects on the county and the warrant-holders as if the call and notice of it had been regular. *Allen v. Bankston*, 33 Ark. 744.

“The object of notice or citation in all legal proceedings is to afford to parties having separate or adverse interests an opportunity to be heard. It is not required for the protection of the applicant or suitor.” *Mohr v. Manierre*, 101 U. S. 425-6.

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2. The call of 1877 was ineffectual to bar warrants not presented, because it does not appear that notice of the call was given as required by law. The act under which the call was made requires the order to be published in "newspapers printed and published in this state;" and by the provisions of the act of February 15, 1875, regulating the publication of legal advertisements in newspapers, the order must "be published in some daily or weekly newspaper printed in the county; . . . provided, there be any newspaper printed in the county, having a *bona fide* circulation therein, which shall have been regularly published in said county for the period of one month next before the date of the first publication of said advertisement." The act of 1875 further provides that "the affidavit of any editor, publisher or proprietor, or the principal accountant of any newspaper *authorized by this act to publish legal advertisements*, to the effect that a legal advertisement has been published in his paper for the length of time and number of insertions it has been published, with a printed copy of such advertisement appended thereto, subscribed before any officer of this state authorized to administer oaths, *shall be the evidence* of the publication thereof as therein set forth."

The order was published in two papers published in the county, but the proofs of publication do not state the papers, or either of them, had a *bona fide* circulation in the county, or that they had been published in the county for the period of one month next before the date of the first publication of the order. Publication of the order in a paper not "authorized," in the language of the act, "to publish legal advertisements," is a nullity; and whether the paper has the circulation, and has been published in the county for the period required by the statute, to authorize the publication of legal notices in its columns, are questions of fact to be proven in the mode provided by the statute for proving the fact of publication. Proof of these facts is a necessary part of the proof of publication, and it must be made by some

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one of the persons authorized to make the affidavit to the fact of publication.

The persons authorized by the statute to make this affidavit are limited to those whose relation to the paper in which the publication is made is such as to afford them personal knowledge of the facts required to be proven, and the statute in terms declares the affidavits of such persons "shall be the evidence of the publication." That all other methods of proof were intended to be excluded is shown by the fact that the act repeals all prior acts which authorized other methods of proof. Besides, it is quite obvious that one principal object of the act of 1875 was to secure beyond any contingency the payment of the printer's fee for publishing the advertisement; and this is accomplished by making his affidavit the only legal evidence of the publication, and then providing he shall not be required to make the affidavit until his fee for publishing the advertisement is paid.

It is a rule without qualification or exception, that when it is sought to conclude a party by constructive service, by publication, a strict compliance with the requirements of the statute is required; nothing can be taken by intendment; and every fact necessary to the exercise of jurisdiction based on this mode of service must affirmatively appear in the mode prescribed by the statute. *Gray v. Larrimore*, 4 Sawy. 638, 646; *Steinbach v. Leese*, 27 Cal. 295; *Staples v. Fairchild*, 3 N. Y. 43; *Payne v. Young*, 8 N. Y. 158; *Hill v. Hoover*, 5 Wis. 371; *Galpin v. Page*, 3 Sawy. 93; S. C. 18 Wall. 350; *Settlemier v. Sullivan*, 97 U. S. 444.

It is not competent for this court to receive parol testimony to supply the omission. *Gray v. Larrimore, supra*; *Noyes v. Butler*, 6 Barb. 617; *Lawry v. Cady*, 4 Vt. 506.

The record of the county court contains this recital: "From said return [sheriff's] the court doth find that due and sufficient and legal notice of the calling in of the outstanding warrants of said county has been given."

The return here referred to is spread at large upon the

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record of the county court in the proceedings under the call, and is made part of it, and discloses on the face of it the defect in the proof of publication which we have pointed out. Where, as in this case, the proceedings are had under special statutory authority, not according to the course of the common law, the recital of due notice must be read in connection with that part of the record which gives the official evidence prescribed by statute. No presumption will be allowed that other or different evidence was produced, and if the evidence in the record will not justify the recital, it will be disregarded. *Settlemier v. Sullivan*, 97 U. S. 444; *Galpin v. Page*, 18 Wall. 350.

McCRAKY, *Circuit Judge*, concurs.

GREENWALT v. TUCKER and others.

(*Eastern District of Missouri. March, 1882.*)

1. PRACTICE — TRIAL UPON AGREED STATEMENT OF FACTS — FRAUD ON JURISDICTION — NEW TRIAL. — A new trial may be granted at the instance of a defendant against whom judgment has been rendered in a case tried upon an agreed statement of facts, upon proof of evidence having been brought to his knowledge after the trial, which he could not have previously discovered by the use of due diligence, showing the perpetration by the plaintiff of a fraud on the jurisdiction of the court.
2. SAME — JURISDICTION — FRAUD UPON. — The transfer by a blank deed *mala fide*, without consideration of the title to land in one state to a citizen of another, for the purpose of bringing suit in a federal court, will not enable the grantee to maintain a suit in ejectment in such court.

Motion for a new trial.

TREAT, *District Judge*. — This is an action of ejectment against three defendants, charging them with being in possession of the premises. There was a joint answer, in which there was no denial of the joint possession as averred; and

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hence the suggestion that the judgment for damages against all the defendants was erroneous, has no foundation in law or in the pleadings or in the facts agreed.

This case was heard on an agreed statement of facts, which has the force of a special verdict. The plaintiff contends that, therefore, nothing is open for consideration or review on this motion, except the conclusions of law upon such agreed statement. That point would be well taken if the motion embraced only what had heretofore been before the court, but it urges, supported by affidavits, that from facts brought to the knowledge of defendants since the trial, and which could not, by due diligence, have been previously ascertained, a fraud on the jurisdiction of the court had been perpetrated in this, to wit: That the plaintiff had no interest in the controversy; that one Reinders, having the tax title in question, executed and acknowledged a deed in blank as to the grantee; that he left that paper with his attorney "for collection" (whatever that may mean); that said attorney filled the blank with the name of the non-resident plaintiff for the mere purpose of bringing suit in her name in the United States court, she not having paid any consideration therefor. The question involved is not free from the embarrassments arising from several decisions, mainly concerning the transfer of promissory notes, etc. Under the judiciary act (1789) the transfer of such notes, etc., even *bona fide* and for value, was subjected to a restriction, in order to avoid an attempt to draw into the federal courts the adjudication of questions therein which could be as well and ought to be determined in the state courts, in which and under whose laws said contracts were made. Hence, that act denied to United States courts jurisdiction "of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of

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exchange." Under that act there have been many decisions, which it is not necessary to review.

The act of 1875, which has in many respects enlarged the jurisdiction of United States courts to an almost indefinite extent, contains this provision:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court, to recover thereon, if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant, and bills of exchange."

The change in the language of the act of 1875, on the subject quoted, may be only another form of expressing, in the light of decisions, what had been held to be the true interpretation of the act of 1789. However that may be, the various acts of congress, and the better decisions thereunder, look to the preservation of the constitutional rights of citizens, to a judicial determination of their controversies in the federal courts, when fairly entitled thereto, and to a prevention of fraudulent or other contrivances, whereby the federal should supersede, or be substituted for, the more rightful jurisdiction of state courts.

There are several cases in which it is held that a *bona fide* transfer for value, although made for the purpose of giving jurisdiction to a federal court, should be held valid for jurisdictional purposes. Some of these cases are noted in *Marion v. Ellis*, 10 Fed. Rep. 410. If any of said cases have gone so far as to hold that a formal transfer, without consideration, for the mere purpose of having a federal court obtain jurisdiction, is valid, this court cannot assent to such doctrine. None of those cases, however, rightly considered, can properly be held to advance such a rule. The ruling in this case does not cover cases of *bona fide* transfers for value. The rule as to promissory notes, etc., under the act of 1789, and as to contracts under the act of 1875, are especially suggestive as

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to actions in ejectment, wherein the rights of the parties are ordinarily dependent, if title is involved, upon local statutes. It is a familiar principle that on questions of title the federal courts follow the interpretation given to state statutes by the court of last resort in the state. Its interpretation becomes a rule of property, and may be considered conclusive, not as in cases under the law merchant. Why, then, should not the state courts decide what is peculiarly in their province, unless a non-resident, who, in good faith, has a case for adjudication, chooses to come into a federal court? Can a nominal grantee, who has no real interest in the controversy, and to whom the realty has been transferred only for the purpose of bringing, in his name, a suit in the federal court, escape the consequences of a plea in abatement, or of an issue in the nature of a plea in abatement, whereby it may be shown that he is not the real party in interest, and further, that his formal relation to the controversy was solely to effect a fraud on the jurisdiction? Can it be that, under pretense of a constitutional right as to citizenship, such frauds can be successfully perpetrated? There is, and long has been, a statute of Missouri in the following words:

“Any conveyance of land made by a citizen or citizens of this state to a citizen or citizens of any of the states or territories of the United States, without a valuable or *bona fide* consideration, and for the purpose of, or with the view of, giving jurisdiction to any of the courts of the United States, and thereby to harass the occupants thereof, shall be and the same conveyance is hereby declared inoperative,” etc.

Of course, no state statute can deprive a citizen of any of his rights under the federal constitution and laws, and if the Missouri statute just quoted were the only authority on the question before this court, no special weight could be given thereto where real controversies exist between a citizen of Missouri and a citizen of another state. The statute in question, so far as quoted above, merely announces a recognized rule in the federal courts, and proceeds to affix consequences

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for the attempted fraud. With those consequences this court has in this case nothing to do. The sole question is whether the transfer by a blank deed, *mala fide*, without consideration, of the title to a parcel of land in Missouri, for the purpose of bringing suit in this court, will enable such a grantee to maintain an action of ejectment here? If such be permissible, then, despite constitutional and legal provisions and restrictions, nearly every controversy can, through fraudulent schemes, be absorbed in the federal vortex, to the great damage and possible ruin of the adverse party through extraordinary costs and expenses. A citizen of Missouri, resident on the Iowa border, or resident on the Arkansas border, the title to whose land his neighbor disputes, can have the cause tried in his county, where the witnesses reside and where the *locus in quo* is known, according to the state laws, which are controllable in every forum. Why, then, should he be dragged far away from his home to contest his rights at great expense in another forum, instead of having the controversy judicially determined where it can be properly and inexpensively investigated?

In the case now under consideration this court rules that the motion for a new trial should be granted, for the following reasons:

(1) That since the trial new testimony has been discovered, which by due diligence could not have been previously obtained.

(2) That the *prima facie* showing of the defendants is to the effect that a fraud on the jurisdiction of this court has been practiced. No court with jealous regard to its duties will permit itself to be an instrument of fraud.

If the judgment in this case were sought to be impeached by summary or plenary proceedings, the court would be bound to take cognizance thereof. It is not necessary in all cases to bring a bill in equity to have a judgment set aside by fraud, but where the injured party proceeds promptly, as by a motion for a new trial or otherwise, the court will en-

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tertain the question, granting to the respective parties due opportunity to be heard. On the present motion the court must act from the evidence before it, which, if true, shows a fraudulent judgment.

Motion sustained.

McCRARY, *Circuit Judge*, concurs.

Monk & Monk, for plaintiff.

Chas. Gibson, for defendants.

NICKERSON *et al.*, Trustees, v. ATCHISON, TOPEKA & SANTA FE
RAILROAD Co.

(*District of Kansas. November, 1881.*)

1. TRUST DEED — EXPENSES OF EXECUTING TRUST.— Where a trust deed conveyed a large body of lands to trustees to secure the payment of a large number of bonds and the interest thereon, the bonds having a long period of time to run, and where the grantor in said trust deed retained the right to make sales of said lands and pay over to the trustees the proceeds of such sales after deducting the expenses of executing the trust, it was held that the grantor had the right to retain the reasonable expenses incurred by it in making such sales. *Held*, further, that said grantor had the right to pay legal taxes from such proceeds.
2. CONTRACT — CONSTRUCTION ADOPTED BY THE PARTIES THERETO.— In cases where there is doubt as to the true meaning of a contract, the fact that the parties themselves who made it at once adopted a particular construction, and for many years acquiesced in and acted upon it, should lead a court to resolve its doubts in favor of the construction adopted by the parties.

Equity.

This cause is submitted upon demurrer to the bill. The facts, so far as it is necessary to state them, are as follows: In 1870 the respondent railroad company executed a deed of trust and mortgage upon a large body of lands to com-

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plainants as trustees, to secure certain of its bonds maturing October 1, 1900. The clauses of this instrument now to be construed are the following: Article first provides that "the said party of the first part, its successors or assigns, shall be suffered and permitted to possess, manage, use and enjoy the aforesaid lands in the same manner and with the same effect as if this deed of trust and mortgage had not been made, and except as hereinafter provided."

Article second provides that "all moneys arising from the sales of the said lands, *after deducting the expenses of executing this trust*, are hereby pledged to the payment of said bonds, and of the interest coupons or warrants thereunto attached; and the said parties of the second part shall receive all the proceeds from the sale of said lands, and shall use and apply the same toward the payment of the interest on the bonds secured by this deed of trust and mortgage as the same may become due and payable, and shall retain any surplus remaining in their hands after the payment of such interest from time to time for the due and prompt payment of the principal of the bonds hereby secured when the same may become due, subject, however, to the conditions of the following article."

Article three provides for investing any surplus arising from the sale of said lands, and also that "whenever the cash value of the assets in the hands of the parties of the second part shall exceed the total amount of the said land grant bonds then outstanding, the said parties of the second part shall pay over and deliver the surplus from time to time, and as the same shall accrue, to the treasurer of said party of the first part for the time being."

Article fifth authorizes the railroad company "to sell at any and all times for cash, or contract to sell, partly for cash and partly on credit, on reasonable terms, any of the lands mortgaged, and to receive land grant bonds in payment; and all moneys so received shall be paid to said trustees and held and applied by said trustees upon the

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trust herein set forth;" and further, "that the said trustees, upon the receipt of the purchase money, shall release and discharge the said land so sold from any and all incumbrances created hereby."

Article sixth provides that "the trustees shall have full power from time to time to employ such clerks and assistants as they shall find necessary to enable them to discharge properly the duties devolving upon them under the provisions of this instrument in respect to the sale or conveyance of the land granted as aforesaid."

The bill avers that, under the provisions of this instrument, the railroad company has organized and maintained from year to year a large and efficient bureau, denominated its land department, for the sale of these lands, the expenses of which, since its organization in 1871, for agents, employees and a multitude of other matters, aggregate about \$700,000, which it has not paid over to complainants. The question to be decided is whether the railroad company has the right to pay the expenses of making sales of the land, and certain taxes, out of the proceeds of such sales.

Ross Burns, J. G. Waters, A. A. Hurd and S. O. Thacher,
for complainants.

Geo. R. Peck, for respondent

McCRARY, *Circuit Judge*.—The sole question to be decided upon this demurrer is, whether the expenses attending the sale of the lands by the railroad company are properly to be classed as "expenses of executing the trust;" in other words, we are to determine from an inspection of the whole instrument whether the parties intended that the railroad company should make sales of the lands and pay over the gross proceeds to the trustees, deducting nothing for expenses.

It is very clear, we think, that the sale of the lands was regarded by the parties as a part, and a very important part, of the execution of the trust.

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The debt secured was very large and the bonds are not to mature until October 1, 1900. The evident intention of the parties was that the land should be sold as rapidly as possible, and the proceeds applied, after paying expenses of sale, to the discharge of interest as it accrued, and the creation of a sinking fund for the payment of the principal. By the terms of the mortgage the railroad company was to retain possession and control of the land with power to dispose of the same for cash, or partly for cash and partly on credit, on reasonable terms. In effect the railroad company was constituted the agent of the trustees and bondholders to sell the land and pay over the proceeds, "after deducting the expenses of executing this trust," to the trustees to be applied upon the payment of the mortgage debt. The proceeds of the sales, "after deducting the expenses of executing" the trust, were pledged for the payment of the bonds and interest, and of course only the moneys so pledged were to be paid over to the trustees. It is true that certain duties were devolved upon the trustees, and their expenses, including sums paid to clerks, agents and attorneys, were to be paid, but we cannot assent to the proposition that these were the only expenses to be deducted from the proceeds of the sales. The parties saw fit to so frame the contract as to devolve upon the railroad company many important duties in connection with the execution of the trust, and we must presume that the large expenditures on the part of the company made necessary by the contract were in the intention of the parties to be included in the expenses of carrying out the agreement.

The mortgage abounds in provisions regulating the sale of the lands and the application of the proceeds thereof. This feature of the contract set forth in the mortgage is so prominent as to make it very apparent that its execution must be regarded as part and parcel of the execution of the trust expressed therein.

We are therefore of the opinion that the railroad company was authorized to retain, out of the proceeds of the sale of

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lands embraced in the mortgage, its reasonable expenditures incurred in making such sales. The bill does not aver that the expenditures of the railroad company were unnecessary or unreasonable, and it must therefore be considered as only raising the question whether the railroad company was entitled to make any charge for selling the land and to deduct the same from the proceeds of the sales.

The bill further alleges that a large sum has been paid by the company, out of the proceeds of sales of land, for taxes upon the same. As legal taxes were liens upon the land prior and paramount to any claim under the mortgage, it is difficult to see upon what ground their payment can be regarded as an expenditure outside of the trust.

The railroad company, by the terms of the mortgage, was to be suffered and permitted to possess, manage, use and enjoy the lands in the same manner and with the same effect as if the deed of trust and mortgage had not been made, except as in the instrument otherwise provided; and it was, as we have already seen, to be allowed to manage the matter of selling the lands. The control, management and sale of the lands by the railroad company was therefore provided for as a part of the contract and of the trust. The payment of the taxes accruing from year to year was plainly a part of the proper management of the estate. If it had been neglected, the whole property would have been lost, and the bondholders would have been the chief sufferers.

If the land had been sold, subject to the taxes, the price received for it would have been correspondingly less, and therefore no damage has resulted to any of the parties interested by reason of their payment. We are therefore clearly of the opinion that the payment of the taxes was properly within the duties devolved upon the company in the management and sale of the lands.

If we were in doubt as to either of the questions raised by the demurrer, the fact that the parties themselves who made the contract at once adopted the construction above

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suggested, and have for many years acquiesced in and acted upon it, would lead us, without hesitation, to resolve our doubts against the claims of the complainants.

The trustees, acting upon the theory that the company was entitled to retain the expenses in question, including sums paid for taxes, have from time to time received the net proceeds of sales ascertained upon that basis, and have voluntarily executed releases in accordance with the terms of the mortgage. It is not necessary to determine whether such action continued for so long a period is an absolute estoppel, which deprives them of the privilege of now being heard to assert that this construction was erroneous. It is enough to say that the construction which the parties themselves placed upon their own contract, and upon which they have so long acted, is the one which the court ought to adopt.

The demurrer to the bill is sustained.

FOSTER, *District Judge*, concurs.

MILLER v. CHICAGO, BURLINGTON & QUINCY RAILROAD CO.

(*District of Iowa. October, 1881.*)

1. REMOVAL OF CAUSES — LOCAL PREJUDICE — CITIZENSHIP. — Under the third subdivision of section 639 of the Revised Statutes of the United States, commonly known as "the local prejudice act," it is not necessary in order to the removal of a cause that it should appear from the record that the parties were citizens of different states at the time that the suit was commenced.

McCRARY, *Circuit Judge*. — This suit was removed to this court from the state court under what is known as the "local prejudice act" of 1867, now embodied in the 3d subdivision of section 639 of the Revised Statutes of the United States. At the last term there was an order remanding the case to the state court. After said order was entered, the counsel

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for the defendant moved that it be set aside, and thereupon the court suspended its execution until that motion could be heard before the full bench. The question is whether, under the said 3d subdivision of section 639 of the Revised Statutes, it is necessary, in order to the removal of a cause, that it should appear from the record that the parties were citizens of different states at the time the suit was commenced. It was held in the case of *Pechner v. The Insurance Company*, 95 United States, 183, that under the 12th section of the judiciary act of 1789, this was necessary. In the case of *Kaiser v. The Railroad Company*, recently decided in this court, and reported in 6th Federal Reporter, page 1, it was held that the same rule prevails under the act of March 3, 1875. In *Johnson v. Monell*, 1 Woolworth, page —, it was held by Mr. Justice Miller, while holding the circuit court, that under the local prejudice act, now embodied in the said 3d subdivision of section 639, it was sufficient to show the citizenship of the parties at the time of the filing of the petition for removal. If, therefore, the last named decision is not to be regarded as overruled by the two more recent decisions above cited, in both of which Mr. Justice Miller concurred, the present motion must be sustained, and this court must retain jurisdiction of the case.

In view of these facts, and considering the importance of the question of practice involved, I have thought proper, with the concurrence of Judge Love, to submit the question to Mr. Justice Miller for his opinion and advice, which he has very kindly furnished to us as follows: "I think it may be taken for granted now that the act of March 3, 1875, did not repeal the third clause of section 639 of the Revised Statutes. That clause, in describing the class of cases in which it authorizes a removal from a state to a federal court, begins by saying: 'when a suit is between a citizen of the state in which it is brought and a citizen of another state,' etc., it may be removed on account of prejudice or local

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influence. If the language here used is to be construed literally, undoubtedly such a suit *is* pending when the application for removal is made. But apart from this restrictive view of the language of the Revised Statutes, which constituted the law when the act of 1875 was passed, it is to be observed that the *main ground* of removal under the act of 1867, embodied in this clause of the revision, is the existence of 'prejudice or local influence.' Removal, where citizenship alone was the cause, has been provided for by other statutes and is found in other sections of the revision. But since removal for prejudice could not constitutionally be made without the required citizenship, it was necessary to incorporate into this statute so much on that point as to make the statute constitutional. It is not necessary, in that view, that the citizenship should have existed when the suit was brought. It is fair to presume that congress meant to say that whenever the requisite citizenship coexists with such prejudice or local influence as will prevent a fair trial in the state court, the party liable to be injured by that prejudice, namely, the one who is a citizen of another state, may have the cause removed. As regards the case of *Insurance Company v. Pechner*, I think I am not mistaken in saying that the ground of that decision was that congress *had not intended*, and the language used showed this, to allow a case to be removed on the ground of *citizenship alone*, except where that cause of removal existed when the suit was commenced. In the case before you, citizenship is a necessary incident to removal, but is not the principal ground on which the right is founded, and there exists no language in the statute which implies a limitation of the right to citizenship in different states existing when the suit was brought. Nor does the reason apply, for surely it is right that when prejudice or local influence will prevent a fair trial, a change of venue should be had; and if *then* the parties have the requisite citizenship, no reason is perceived why the change should

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not be to a federal court. No provision of the statute nor any sound policy of law forbids such a transfer of the case."

The motion to set aside the order remanding the case is sustained.

LOVE, *District Judge*, concurs.

KANSAS CITY ELEVATOR CO. v. UNION PACIFIC R'Y CO. *et al.*UNION PACIFIC R'Y CO. *et al.* v. KANSAS CITY ELEVATOR
CO. *et al.*

(*Western District of Missouri, Western Division. May, 1881.*)

1. **LEASE — RE-ENTRY — FORFEITURE.**— The right of the lessor in a lease of real estate, to declare the lease forfeited, and thereupon, of his own motion, to re-enter the premises, is a very harsh remedy, and is to be restrained by the courts within narrow limits, and the lease is to be construed strongly in favor of the lessee, the court taking pains to see that no injustice is done.
2. **SAME — TAXES AND RENTS.**— The law is well settled that a demand for the payment of taxes and rents is necessary as a condition precedent to the right of re-entry, where the lease provides for re-entry upon a failure to pay the same.
3. **ASSIGNMENT OF LEASE — SUBLETTING.**— Where, by the terms of a lease, the lessee was to keep the property in his own hands, and where, during two or three months of the term, the property was turned over to a third party without the assent of the lessor, *held*, that the lessor waived this breach by acquiescing and by failing to object for a considerable period of time.
4. **SAME — SAME.**— Where a lease upon an elevator and warehouse provided that the lessee should "not sublet said elevator and warehouse, nor assign or transfer this agreement without the written consent thereto of the superintendent of the party of the first part," *held*, that the lessee might either sublet or assign with the assent of the officer named.
5. **RAILROAD — APPOINTMENT OF RECEIVER — SUPERINTENDENT.**— Under a stipulation in a lease executed by a railroad company, requiring the assent of the superintendent of the railroad to any assignment or subletting, where the railroad passes into the hands of a receiver appointed by the court, the superintendent who acts under the direction

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of the receiver is to be regarded as the superintendent of the railroad company for the purposes of such a contract.

6. ELEVATOR — POOLING ARRANGEMENT — RE-ENTRY UNDER LEASE. —

What is known as the pooling arrangement entered into by the lessees in this case and set forth in the opinion, however immoral and improper it may have been, was not, according to the terms of the lease, sufficient to authorize the lessor to declare a forfeiture and re-enter the premises.

In equity.

In 1866 the Kansas Pacific Railway Company purchased a tract of land of about thirteen acres in Jackson county, Missouri, within the limits of the city of Kansas City and adjoining the state line, for depot and other purposes incidental to the operation of its road.

On May 6, 1874, it and the Kansas City Elevator Company entered into a written agreement, by which the railway company granted unto the elevator company "the right to erect a grain elevator" upon a portion of this ground, being somewhat less than one acre, and the "right to use and occupy the premises for such purpose," and no other, for the term of twenty years, "said party of the second part yielding and paying therefor to the said party of the first part the yearly rental of one hundred dollars in two half-yearly payments."

The elevator company on its part covenanted, among other things, that it would, at its own expense, erect an elevator on the premises and maintain the same; that it would use the same only for a legitimate business of storing and forwarding grain; that it would charge for storage and delivery of grain only reasonable and compensatory charges, and such as might be charged for like services at other elevators of similar character at Kansas City; that it would in every way accommodate shippers and the general public, so as to transact its business to the best of its ability to the satisfaction of the patrons of the railway company; that it would, at its own cost and charge, pay and discharge all such duties, taxes or assessments, extraordinary as well as ordinary, as

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should during the continuance of the agreement be legally assessed upon the said land.

The seventh provision of the agreement was as follows:

"And said party of the second part further covenants and agrees that it will not sublet said elevator and warehouse, nor assign or transfer this agreement, without the written consent thereto of the superintendent of the party of the first part."

The twelfth was as follows:

"Twelfth. And it is distinctly understood and agreed between the parties hereto, that in case the said party of the second part shall make default in any of the covenants herein contained on its part to be kept and performed, then and in that case it shall and may be lawful for said party of the first part, its assigns, successors, agents or attorney, at its election, to declare this agreement at an end and into and upon the premises hereinbefore described or any part thereof to re-enter with or without process of law, and the said party of the second part or any person or persons occupying said premises, to expel, remove and put out, using such force as may be necessary for that purpose, and the said premises again to repossess and enjoy in its first and former estate."

Under this agreement the elevator company erected an elevator and operated it continuously until the fall of 1878, when their superintendent died. From that time for about two months the elevator was practically closed, the company being unable to secure a suitable person for superintendent. In December, while the elevator was so closed, another elevator, operated by Mead & Templer, fell down, and a temporary verbal arrangement for no definite period was made with them by which they were permitted to remove their grain from the fallen elevator, store it in and operate the Kansas City elevator. Under that agreement they continued to use the property until April, 1879, when the elevator company leased the property to them for a period ending July 1, 1880. During the operation of the elevator by the

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elevator company an arrangement had been made by all the elevators in Kansas City, by which a certain proportion of the gross monthly earnings of each elevator were placed in the hands of a common treasurer and by him distributed among the elevators according to a certain ratio established by agreement. This was called the "elevator pool," and was organized for the purposes of maintaining uniformity of charges for storage of grain. The sub-lease made to Mead & Templer bound them to observe and abide by the rules and regulations of this pool. As rent they were to pay to the elevator company sixty per cent. of the gross earnings of the elevator. The evidence showed that the rates established by the pool were fair alike to elevator and shipper, and failed to show that any complaint had ever been made of them.

In November, 1876, proceedings for the foreclosure of one of the mortgages on the Kansas Pacific Railway were commenced, and receivers of the property of the company appointed, by whom and their successors it continued to be operated until the summer of 1879, when under the orders of court it was returned to the company, since which time the Union Pacific Railway Company, by virtue of certain articles of consolidation, has succeeded to the rights of the Kansas Pacific Railway Company in its property. Immediately upon the appointment of the receivers, the superintendent of the road resigned and the railway company never appointed a successor to his position. The receivers, however, as they were authorized to do by the order appointing them, appointed T. F. Oakes general superintendent, and under their direction he performed the duties of superintendent until April 1, 1879, when he resigned. At the time of the execution of the sub-lease to Mead & Templer, it was submitted by an officer of the elevator company to Mr. Oakes, who made upon it the following indorsement:

"Approved:

T. F. OAKES,

"Gen. Supt. K. P. R. W."

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Mead & Templer continued to operate the elevator under their sub-lease until June, 1879, when Mead retired from the firm, and Templer carried on the business under the same lease until May 31, 1880, when, having become largely indebted to the Armour Bank, he assigned to it the sub-lease. The bank held warehouse receipts for grain in the elevator, and this assignment was made to it that it might obtain possession of the elevator and thus be secure in its possession of the grain covered by its receipts. It had no intention of operating the elevator further than was necessary to effect the removal of its own grain. This assignment was made in the night and without any knowledge on the part of the elevator company, nor was the latter informed of it until the 23d day of June, 1880. The bank under this assignment took possession of the property, began and continued the removal of its grain, until the early morning of June 3, 1880. At that time one of the attorneys of the railway companies, with a few men under his control, took possession of the property, no resistance being made by the two or three employees of the bank who happened to be present. Simultaneously with this entry notice of forfeiture of the agreement of May 6, 1874, was served by an agent of the railway companies upon the president of the elevator company, who was in bed at his residence one mile away, and upon Templer at his residence two miles distant from the elevator. The notice asserted that the forfeiture was for non-payment of rent. A number of men were at once placed in and about the property by the railway companies, to defend their possession, and the grain belonging to the Armour Bank was as soon as practicable run out and delivered to the bank. On June 7th the railway companies served another notice on the elevator company, asserting that the contract of lease of May 6, 1874, had been declared at an end, not only because of default in the payment of rent, but because of breach of each and every of the covenants and conditions contained in said contract to be performed by

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the lessee. The situation remained unchanged, the railway company being in possession until midnight of June 19, 1880, it being Saturday, when about three hundred of the employees of the railway company were brought to the premises from the state of Kansas, equipped with all implements necessary for the purpose, and under the direction of the superintendent and other chief officers of the company were about to tear down the buildings. That hour was selected, as the evidence showed, because no preventive process could be issued from the courts on Sunday. The officers of the elevator company had, however, a short time before been warned, and had at about ten o'clock that night served upon the superintendent of the railway company, notice of an application to be made on the succeeding Monday morning, for an injunction against the threatened destruction of the buildings. When the crowd of employees appeared on the ground, Mr. Chace, the mayor of the city, and a few policemen were sent for, and their interference prevented the demolition of the structure that night.

On Monday morning, June 21st, a preliminary injunction was obtained restraining the railway companies from removing, destroying, tearing down or in any manner injuring the buildings.

On June 23d, knowledge of Templer's assignment to the Armour Bank having come to the elevator company, its board of directors passed a resolution declaring the sub-lease to Mead & Templer forfeited for that cause (that instrument containing a provision for forfeiture in that case), and notice of the forfeiture at once given to Templer and the Armour Bank, both of whom acquiesced in the declaration, and disclaimed all possession or right thereto, and on the next day the elevator company brought an ejectment suit against the railway company for the possession of the property.

The elevator buildings and machinery had always been assessed for taxation as the personal property of the elevator company, by whom the taxes had been regularly paid.

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The leased ground had never been listed for taxation by the local assessors, but all the property of the railway company in the county had been valued as an entirety for taxation by the state board of equalization. No specific assessment of the ground leased to the elevator company had ever been made; nor had the latter ever paid any taxes on the ground; nor had it ever been requested by the railway company to pay such part of the whole tax as was proper to be borne by the leased ground.

The ground rent for the six months ending May 6, 1878, was the last that had been paid; it had always been paid irregularly without objection on the part of the railway company, and at the time of the entry by the latter on June 3d, \$200 was due and unpaid, but no demand for its payment had ever been made. The elevator was situated about one thousand feet from, and in plain view of the freight office of the railway company, and was connected with the main line by a side track.

Soon after the granting of the temporary injunction in behalf of the elevator company, the railway companies filed their answer to the bill, and also filed their bill against the elevator company and Mayor Chace. They prayed that their action in declaring the agreement of May 6, 1874, at an end be affirmed by the court, that the elevator company be forever barred from making any claim to the occupancy of the ground or buildings, and that it and Chace be enjoined from interfering with the railway companies in the control and possession of the premises and improvements.

Upon the final argument, the two causes were, by agreement, heard together.

In argument, it was claimed for the railway companies that their re-entry and possession was rightful, and that the elevator company had forfeited all rights under the agreement, because:

1st. The ground rent had not been paid.

2d. The taxes on the ground had not been paid.

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3d. That by the making of the sub-lease to Mead & Templer, the seventh covenant in the agreement had been broken. That Oakes, whose consent thereto in writing had been obtained, was superintendent of the receivers, *but not of the railway company*; and for that reason he was not the person designated by the agreement, whose consent to a sub-letting must be procured.

4th. That the seventh provision should be construed as an absolute prohibition of sub-letting; and that it was only an assignment or transfer of the lease to which the superintendent could consent.

5th. That the pooling arrangement conflicted with the manifest purpose of the railway company in making the agreement, which was to afford convenient elevator facilities to its patrons at compensatory rates, and was in violation of the whole spirit of the contract.

6th. That the verbal arrangement entered into between the elevator company and Mead & Templer, whereby the latter were let into possession in December, 1878, was a violation of the covenant not to sublet.

7th. That the agreement of May 6, 1874, was not a lease, but a license, and therefore the rules of law applicable to the relation of landlord and tenant, especially as regarded the necessity of a demand for rent, had no application to this case.

8th. That the agreement of May 6, 1874, was *ultra vires*, the land having been acquired for depot purposes; and the evidence showing that the entire tract of land was required for the use of the railway company in the operation of its road, the contract ought not to be enforced against it, even if there had been no breach of its conditions.

Gage & Ladd and *Karnes & Ess*, for the elevator company.

J. P. Usher, A. L. Williams and *Charles Monroe*, for the railway companies.

MILLER, *Circuit Justice (orally)*.—We will proceed this morning to dispose of what is called the "Elevator Case," which has occupied several days in argument.

I shall not be able to-day to deliver any but a very brief opinion.

There are two bills. One is brought by the elevator company, the main purpose of which seems to be to prevent the railway company from pulling down and removing the elevator itself. No other relief is asked, except that the railway company shall be enjoined from pulling down, or tearing down and removing the elevator.

The other is the bill of the railway company, and it states the reasons why they entered on the ground, which is the subject of controversy. They justify their act by reference to the power which the lease or contract under which the elevator company held conferred upon them, being the right of re-entry. And they ask a declaration or decree that their act, in that particular, shall be affirmed, and their right to re-entry shall be held to be valid. That is the substance of the relief asked in this case. There is no prayer for damages, or compensation, or restoration of possession, or anything of that kind which will shorten very much the consideration of the case.

We are to consider the sufficiency of the reasons alleged by the railway company for its re-entry upon the ground which it had leased (for I think the instrument is a lease) to the elevator company.

There are several of these reasons. I do not feel called upon to go into any lengthy discussion of them.

The first two of them are, that the elevator company had failed to pay its rent, and had failed to pay its taxes according to the terms of the instrument. I am quite satisfied that neither in regard to payment of rent, nor in regard to payment of taxes, was there any sufficient foundation for declaring the lease forfeited, or for the exercise of the power of re-entry on the part of the railroad company.

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As a proposition pervading this doctrine of the right of re-entry by the forfeiture of a lease of land, it is to be observed that the power to be exercised is a very strong power, and it is one which is exercised without the judgment of a court of justice or of anybody else but the party who is exercising it. The party determines for himself whether he has the right of re-entry without any resort to a court of justice. This is always a harsh power. It has always been considered that it was necessary to restrain it to the most technical limits of the terms and conditions upon which the right is to be exercised. Hence it is that the old common law provided in this class of contracts that it was the duty of the court to see that no injustice was done. It is reasonable, it is natural, that when a contract puts into the power of one man to say that under certain contingencies of which he is to be the judge, he shall enter upon the house, or home, or property of another, and eject him instantly, and take possession, — it is reasonable, it is proper, that the contract and the acts which justify such a course of conduct should be construed rigidly against the exercise of the right. A court of equity, when necessary, when this power has been exercised, will come in and afford relief.

In regard to the taxes and rents the law is well settled, I think, that a demand for the payment thereof is necessary as a condition precedent to the right of re-entry.

The next proposition upon which the re-entry in this case depended, is that there was a period of two or three months during which this elevator was run under a verbal lease, without the approval of the railway company or any of its officers. It is sufficient to say as to this, that if it was provided by the lease that this elevator should be kept in the hands of the original parties (as it probably was), it seems to us that the time which elapsed before the railroad company undertook to enforce their rights under that breach of the terms of the lease, is enough to condone or waive it. If the written lease under which Mead & Templer held the

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property is a valid instrument, and if the approval of the superintendent is a valid approval, they waived the former use of it for a month or two by the same parties prior to the execution of that lease.

The next question is whether the parties forfeited their lease from the railway company by the making of a lease to Mead & Templer. The argument (and it is a very ingenious one) is, that under this seventh (7th) clause of the original lease between the elevator company and the railway company, there was no power to lease or sublet at all, and that the approval and consent of the superintendent were with relation to allowing an assignment of the contract. The article reads as follows:

“And the said party of the second part further covenants and agrees that it will not sublet said elevator and warehouse nor assign or transfer this agreement without the written consent thereto of the superintendent of the party of the first part, and that it will not use said building for any other purpose than that contemplated by the terms of this contract.”

It is said that the meaning of that is that they will not sublet the elevator at all, and that they can only assign upon the written consent of the superintendent of the railway company. As I stated before, I cannot enter into a full discussion of these questions, but it is sufficient to say that in my opinion it embraces the subletting, and that it may be done with the consent of the officer named in the instrument.

This sub-lease to Mead & Templer did have the approval of a man who said on the back of it that he was the superintendent. The only question is, was he such superintendent? It is said that he was not the superintendent of the company because the railway had been put into the hands of receivers, who exercised general control over the road and its property, and that this man, Mr. Oakes, who approved of the instrument, was the superintendent of the receivers, and not the superintendent of the company. I think that his

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approval was sufficient to justify the lease in this case. This railway company existed when this contract was made with an officer known as superintendent, and among his duties it was specially stated in the by-laws of the company that he should have charge of all the property and depots of the company. It is my opinion that when the former superintendent resigned or was removed, and the receivers were appointed, and they appointed Mr. Oakes superintendent, that he was the legal superintendent of that road, with the power to exercise those very functions that the prior superintendent had possessed. That his acts in pursuance thereof were properly and legally the acts of the railway company. That simply means that the lawful superintendent of that railway corporation at that time was Mr. Oakes. Therefore I think that the sub-lease was a valid lease, and creates no right of re-entry on the part of the company.

I don't think it is necessary to enter into an inquiry as to whether this lease, in the nature of its terms, is *ultra vires* or beyond the power of the company, or not.

The argument now is that this lease was to run for twenty (20) years, and that the probability was that the company would need the land for the ordinary uses of the railroad, and that therefore it had not the power of putting this land out of its *control*. This argument is not sound. The company owned the land, and, not having any immediate use for it, it made a lease, fixing its own terms and the time when it could resume possession, and it is not according to the law for it to turn around now and say that they need the land. All the doctrines of contracts, all the doctrines of the rights of corporations, are opposed to it.

I don't recollect now of any other but one proposition that has been urged. One other ground has been urged as supporting the right of re-entry, and to declare the instrument forfeited; that is, the pooling arrangement which the elevator company entered into. What that arrangement was, is not very definitely stated. All we know is that it

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was a contract, one clause of which is pointed out as authorizing the party to re-enter in consequence of such contract, upon the ground that it violates the fifth (5th) clause of the original lease between the elevator company and the railway company, which says:

“And said party of the second part further covenants and agrees that it will use said premises for no other purpose than a legitimate business of receiving and forwarding grain, and that it will charge for storage and delivery of grain from said elevator only reasonable and compensatory commissions, and such as may be charged for like service at other elevators of similar character at Kansas City, and that it will in every way accommodate and serve shippers and the general public, so as to transact its business to the best of its ability to the satisfaction of the patrons of said party of the first part.”

As I said before, when a party seeks to declare a contract forfeited by an act of his own, he must point out specially some clear act in violation of the terms of the lease which authorizes said forfeiture. This pooling may be a very bad business; it may be very wicked. It may be as wicked as counsel represent it to be; but by the terms of the agreement such wickedness is in no way made a reason for the forfeiture of this lease. Besides, in regard to this clause, the only point is, that it is provided that “said elevator will receive and deliver grain for reasonable and compensatory commissions.” There is no proof in this case that they ever refused to do so. The proof, on the contrary, is that the commission they received was reasonable. Here is an agreement under which a forfeiture is claimed on the ground that there must have been exorbitant charges by the elevator company. But the railroad company have attempted to make no such proof here, and the proof on the other side negatives it; and there is no proof that they ever made any but reasonable and compensatory charges. It may be that this pooling arrangement confers rights that may be maintained in other cases,

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and other suits, but it did not confer the right of re-entry. This is not the proper place for me to consider that question. It may come up hereafter in another shape in other suits. All that I have to say now is, that the provisions of the lease have not been violated so as to forfeit the lease *ipso facto*.

I want to call the attention of counsel to what seems to me to be an error in regard to the rights assumed as growing out of these suits. I have already said that the right of re-entry and forfeiture, in regard to the terms of the lease, is a right which the courts at common law dealt with very rigidly and strictly, while a court of equity very often sets aside and restores the parties to their former position, and refuses compensation for any damage done. There is, however, a different mode of proceeding to declare the lease forfeited. When either party, lessor or lessee, claims that acts have been done which render the continuing of the relation no longer proper, such party can go into a court of equity on general principles and ask to have that lease set aside, cancelled and annulled. In that case the court of equity sits holding the scales of justice evenly between the parties, and may say that it believes that such acts have been done by the lessee, for instance, as ought to terminate the agreement, or that he shall account by compensation and by payment of damages. And the court will declare the agreement at an end, and set aside, and annulled, and will make such orders as seem proper and right. So a party might bring an action for ejectment or for forcible entry and detainer, and these questions might be submitted to a jury and the rights of the parties determined. But in this case the railway company has gone with a high hand and asserted its rights with a strong power. And the question, and only question, to be considered here is whether it was justified. They did not bring an action in which the question of the pool might be considered, but they have simply stated certain reasons why they entered, why they exercised this power of re-entry, and they ask that their action be approved, and their possession

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quieted. Now as to this question of pool, whether there is any reason in it or whether it amounts to anything is not for me to say in this case. It is not a defense for their having taken forcible possession of this property.

The result of these views is that the prayer of plaintiff's bill, asking that the railway company be restrained from tearing down and removing the elevator, will be granted and the temporary injunction will be made perpetual. A declaration will be made that there is not sufficient ground for the railway company to exercise the right of re-entry. And the bill of the railway company will be dismissed.

NICHOLS, SHEPHERD & Co. v. KNOWLES.

(District of Minnesota. June, 1881.)

1. **APPLICATION OF PAYMENTS.**—The rule as to voluntary payments is that the debtor may direct the application of such payments to one of several debts due from him to the creditor.
2. **WHAT ARE VOLUNTARY PAYMENTS?**—A voluntary payment, within the meaning of this rule, is one made by the debtor on his own motion, and without any compulsory process. A payment made upon an execution does not fall within the rule.
3. **CHATTEL MORTGAGE — FORECLOSURE THROUGH SHERIFF UNDER STATUTE.**—When, under the statute of Minnesota, a chattel mortgage is placed in the hands of the sheriff with orders to seize and sell the mortgaged property for the purpose of paying the mortgage debt,* the sale is made by virtue of legal proceedings, and the proceeds of the sale are not voluntary payments the application of which the debtor is authorized to direct; and the creditor may apply such proceeds to the payment of any one of several notes secured by the mortgage.
4. **WHERE** a creditor holds several notes secured by mortgage, one of which is secured by the indorsement of a third party as well as by the mortgage, it may be inferred in the absence of evidence that the parties intended to apply the proceeds of the sale of mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all his security.

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This is a suit upon certain promissory notes executed by defendant to plaintiffs. The notes sued on are the two first due of a series of five notes originally secured by a mortgage upon certain personal property. The mortgage contained a provision authorizing plaintiffs, upon default in the payment of any one note, or of the interest, to declare the whole debt due, and to proceed to foreclose the mortgage according to law. Upon default in payment of the first note of the series, the plaintiffs availing themselves of the privilege thus granted, declared all the notes due and proceeded to foreclose the mortgage under the statute of Minnesota in such cases provided, by advertisement and sale of the mortgaged property through the sheriff of the county. After the property was in the sheriff's hands under the chattel mortgage, the defendant notified plaintiffs that they were required to apply the proceeds of the sale to the payment of the notes secured in the order of their maturity. The plaintiffs, disregarding this notice, applied the proceeds to the liquidation of the two notes last due. The notes first due were further secured by the indorsement of a third party. The defense is that the proceeds of the sale of the mortgaged property should have been applied to the liquidation of the notes first due and should now be so applied.

John W. Willis, for plaintiff.

C. D. O'Brien and *J. C. M. Searles*, for defendant.

McCRARY, *Circuit Judge*.—The rule as to voluntary payments is that the debtor may direct the application of such payments upon one of several debts due from him to the creditor. *Tayloe v. Sandiford*, 7 Wheat. 13. Does this rule apply to the present case? A voluntary payment, within the meaning of this rule, is one made by the debtor on his own motion, and without any compulsory process. A payment made upon execution does not fall within the rule. When, under the statute of Minnesota, a chattel mortgage is placed

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in the hands of the sheriff with orders to seize and sell the mortgaged property for the purpose of paying the mortgaged debt, the sale is made by virtue of legal proceedings, and the proceeds of the sale are in no sense voluntary payments, the application of which the debtor is authorized to direct.

If the debtor could not direct the application of the payments, could the creditor? It is strongly urged by counsel for defendant that neither party could direct a particular application, and that the law will apply the proceeds of the sale *pro rata* upon all the notes. Inasmuch, however, as the mortgage does not direct how the proceeds of the sale of the mortgaged property shall be applied, and since there are no circumstances from which it can be inferred that a *pro rata* application was intended by the parties, I hold that the creditor had the right to apply the proceeds to the payment of any of the debts secured by the mortgage. *Gaston v. Barney*, 11 Ohio St. 506. This view is much strengthened by the fact that some of the notes were secured by the indorsement of a third party as well as by the chattel mortgage, from which it may be inferred that the parties intended to apply the proceeds of the sale of mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all his security. *Stamford Bank v. Benedict*, 15 Ct. 437; *Martin v. Pope*, 6 Ala. 532; *Matthews v. Switzler*, 46 Mo. 301; *Field v. Holland*, 6 Cranch, 8; *Schuelenberg & Beockler v. Martin*, 1 McCrary, 348.

Judgment for plaintiff.

UNITED STATES v. FIELDING, MANSFIELD & Co. et al.

(*Eastern District of Missouri. March, 1882.*)

1. INTERNAL REVENUE — SALE OF STAMPS — COMMISSIONS — STATUTE CONSTRUED.— Under section 3425 of the Revised Statutes of the United States, commissions to purchasers of internal revenue stamps are to be paid in cash; and the same commissions are to be

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paid whether the purchaser pays cash for such stamps, or secures a credit of sixty days and gives a bond as required by said section.

2. SAME — SAME — SAME.— The commissioner of internal revenue has no power to pay commissions in stamps at their face value.

McCRARY, *Circuit Judge*.— This is a suit upon a bond executed to the plaintiff by defendant Mansfield as principal, and the other defendants as sureties, under the provisions of section 3425 of the Revised Statutes of the United States, which is as follows:

“The commissioner of internal revenue is authorized to sell and supply to collectors, deputy collectors, postmasters, stationers, or any other persons, at his discretion, adhesive stamps, or stamped paper, as herein provided for, in amounts of not less than fifty dollars, upon the payment, at the time of delivery, of the amount of duties said stamps or stamped paper, so sold or supplied, represent, and may allow, upon the aggregate amount of such stamps, the sum of not exceeding five per centum as commission to such purchasers; but the cost of any paper shall be paid by the purchaser of such stamped paper. The proprietor of articles named in schedule A, who furnishes his own die or design for stamps to be used especially for his own proprietary articles, shall be allowed the following commissions: On amounts purchased at one time of not less than fifty dollars nor more than five hundred dollars, five per centum; and on amounts over five hundred dollars, ten per centum on the whole amount purchased; *provided*, that the commissioner may, from time to time, deliver to any manufacturer of friction or other matches, cigar-lights, or wax-tapers, a suitable quantity of adhesive or other stamps, such as may be prescribed for use in such cases, without prepayment therefor, on a credit not exceeding sixty days, requiring, in advance, such security as he may judge necessary to secure payment therefor to the treasurer of the United States, within the time prescribed for such payment. And upon all bonds or other securities taken by said commissioner, under the pro-

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visions of this chapter, suits may be maintained by said treasurer in the circuit or district court of the United States, in the several districts where any of the persons giving said bonds or other securities reside or may be found, in any appropriate form of action."

Defendant Mansfield, under the firm name of F. Mansfield & Co., was engaged in the manufacture of matches, and under the section above named the commissioner of internal revenue was authorized to furnish to him a suitable quantity of adhesive stamps on a credit of not more than sixty days upon taking bond and security for the payment therefor within the time prescribed. It was for this purpose that the bond sued on was executed. The case of the government is set out fully in a second amended petition, to which the defendant Mansfield answers in substance as follows:

First. He admits the execution of the bond sued on. Second. He avers that defendant furnished his own die and design for stamps to be used especially for his own matches, and was therefore entitled to ten per cent. as commissions upon all purchases over \$500. Third. That he purchased stamps in amounts at each time of over \$500, in all to the amount of seven hundred and thirteen thousand nine hundred and fifty-five dollars (\$713,955), on a credit of sixty days upon each order; and that he was entitled as commissions thereon to the sum of seventy-one thousand three hundred and ninety-five dollars and fifty cents (\$71,395.50). Fourth. That he has received as such commissions only the sum of sixty-three thousand three hundred and five dollars (\$63,305), and that he has paid on account of such purchases the sum in all of six hundred and thirty-three thousand and fifty dollars (\$633,050). Fifth. Defendant admits that there is due the plaintiff, on settlement, the sum of nine thousand five hundred and nine dollars and fifty cents (\$9,509.50), which he has tendered to plaintiff and now offers to pay.

To this answer the plaintiff demurs. The controlling questions are: first, whether the statute contemplates pay-

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ment of commissions in cash; second, whether any commissions are to be allowed where a credit of sixty days is given and bond taken under the statute above named. The section above quoted undoubtedly contemplates the payment of commissions to purchasers of stamps in cash. It plainly provides that the proprietor who furnishes his own die or design shall be allowed commissions, on amounts over \$500, of ten per centum on the whole amount purchased. It seems that the practice of the department has been to send to the purchaser his commissions in stamps, counting such stamps as cash. That is to say, upon an order for stamps to the amount of \$500, the commissioner of internal revenue would send to the purchaser who furnished his own die or design five hundred and fifty dollars (\$550) in stamps, thus assuming to pay fifty dollars of commissions with fifty dollars in stamps. But this is not authorized by the statute.

There is no provision for paying commissions in any thing besides money. Power to allow and pay commissions means power to allow and pay the same in cash, that is, in the same which the government receives upon the sale. No doubt it is competent for the commissioner, with the assent of the purchaser, to make any arrangement which amounts in substance and legal effect to a sale according to the statute. It is not necessary that the purchasers of the stamps should actually pay over their face value to the commissioner and receive back the commissions in cash; but, unless a purchaser waives his right to it, he is entitled to that which is equivalent to ten cents in cash upon each dollar's worth of stamps purchased. Nor can it be said, as contended by the district attorney, that the extra amount of stamps sent as commissions should be regarded as an additional and separate purchase of that amount, upon which only five per cent. commission could be allowed. In each instance there was but one single transaction. And if the commissioner saw fit to send upon an order for one thousand dollars' worth of stamps eleven hundred dollars in stamps, and the defendant chose

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to accept them without objection, this amounted to one purchase of eleven hundred dollars in stamps by the defendant.

We are also of the opinion that commissions are to be allowed whether the purchaser pays cash or gives a bond and obtains sixty days' time. The bond is in lieu of present payment. It is provided for in a proviso which was evidently not intended to affect, in any way, the provision previously made with respect to commissions. There is no reason founded either in justice or public policy for holding that the purchaser who avails himself of the privilege of giving bond should be deprived of his commissions; and there is certainly nothing in the terms of the statute that requires such a construction. Such being the true meaning of the act, we hold in the present case that the liability of the defendant Mansfield as principal in the bond sued on is to be ascertained by charging him with all the stamps purchased by him from the government, including such as were sent to him in excess of the amount ordered by him, and deducting from the total thus ascertained, ten per centum commissions allowed by law. It follows, if the answer is true, that the sum tendered by Mansfield is the sum due, and for which the United States is entitled to judgment. If, therefore, the district attorney stands upon the demurrer to the answer to the second amended petition, there will be judgment accordingly against the defendant Mansfield.

We do not at present pass upon the defense of the sureties on the bond, as it may not be necessary to do so. If the plaintiff accepts the sum tendered and the defendant Mansfield pays it at once, no question as to the rights of the sureties can arise. If this is not done the court will, upon being so advised, consider and determine the questions raised on behalf of the sureties.

William H. Bliss, District Attorney, for the United States.

Noble & Orrick and *James T. Allen*, for the defendants.

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TAYLOR *et al.* v. CHARTER OAK LIFE INS. CO.

(*District of Iowa. January, 1882.*)

1. **BILL OF REVIEW — WHEN TO BE FILED.**— A bill of review is in the nature of a writ of error, and when it seeks a review for errors apparent upon the face of the record, will not lie after the time within which a writ of error could be brought.
2. **SAME — INJUNCTION.**— In so far as an injunction is sought in this case because of matters appearing in the supplemental decree, no relief can be granted, because it does not appear that the complainant was prejudiced or injuriously affected by anything contained in said supplemental decree.
3. **DECREE — EFFECT OF THE RECORD.** — All the parties to a suit in chancery are bound to know what is done in the case and spread upon the record; and after the rendition of decree, they cannot be heard to complain upon the ground that they were not advised of the contents of such decree in time to have taken an appeal therefrom or instituted other measures for setting aside and reversing the same.

In this case the complainants move for an injunction against the respondent to restrain it from proceeding to execute a judgment at law rendered in an action of ejectment in this court. The application for injunction is based upon the allegations contained in the bill in this cause, which is in the nature of a bill of review to modify or set aside two decrees of this court heretofore rendered in a suit in chancery, wherein the said Charter Oak Life Insurance Company was complainant and the said J. C. Taylor and Nancy J. Taylor, his wife, and others were defendants.

The first of these decrees, which may be designated as the original decree, was rendered on the 29th day of October, 1877; and it was thereby adjudged that the said J. C. Taylor was indebted to the said Charter Oak Life Insurance Company on certain bonds in the sum of \$73,659.16, with the further sum of \$2,500 as attorney's fees, and that the said sums were secured by mortgages upon the real estate now in controversy; which mortgages were thereby foreclosed, and the master of this court was authorized to sell the said land

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for the purpose of satisfying the same. After sale by the master a second decree, which may be called the supplemental decree, was rendered. This decree is dated November 1, 1878, and purports upon its face to have been entered by consent of parties. It provides that the said master's sale be confirmed, and that said J. C. Taylor shall have one year in which to redeem said land from the sale by the master, and directs that the proceeds of the crops grown upon the land during the year given for redemption shall be placed in the hands of one J. R. Barcroft, as receiver, and by him applied towards redeeming the land. It is averred in the bill that the said Taylor and wife never, in fact, consented to the said supplemental decree, and never had any knowledge of the same until after the year for redemption had expired. It is further alleged that at the time of the expiration of the time for redemption, the said Charter Oak Life Insurance Company, together with the said J. R. Barcroft, went on said premises and seized and took possession of and from the complainants about eight hundred bushels of corn and one hundred tons of hay, and did not apply any part thereof to the redemption of the said property sold as aforesaid. It is further alleged that forty acres of the land in controversy is the homestead of the said Taylor and wife; and that in making the sale of said real estate under said foreclosure, it was the duty of the master to have sold said homestead last, and only upon the contingency that the real estate other than the homestead did not bring sufficient to satisfy the amount of the mortgage debt; but that said homestead was in fact sold with the other property, thereby tending to defeat the right of the complainants to said homestead.

The action in ejectment was brought upon the master's deed, executed in pursuance of said foreclosure sale, and the confirmation thereof made in the supplemental decree. At the last term of this court there was judgment in the said ejectment suit for the plaintiff therein, said Charter Oak Life Insurance Company, subject, however, to the right of

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the said Taylor and wife to file their bill in equity seeking relief.

Cole & Cole, for complainants.

Nourse & Kauffman, for respondents.

McCrary, *Circuit Judge*.— So far as the original decree is concerned, this is a bill of review, brought for the purpose of reversing or modifying said decree, by reason of errors appearing upon the face thereof. These errors are stated in the bill to be —

1. In this, that interest was calculated upon the several bonds sued on at the rate of ten per cent. per annum, whereas, under the laws of Iowa, said complainants were not entitled to any interest thereon, because of the fact that there was usury embraced in the said several bonds.

2. In that by the laws of Iowa the said Taylor and wife were entitled to have said real estate sold subject to their right to redeem the same at any time within one year after the sale, and said decree did not reserve this right, whereby they were greatly prejudiced.

It is insisted by the defense that this bill of review, considered as a bill to modify or annul the original decree, is filed too late. This position is manifestly well taken. A bill of review is in the nature of a writ of error, and its object is to procure an examination, or alteration, or reversal of the decree made upon a former bill which has been signed and enrolled. Story's Equity Pleading, sec. 403. "A bill of review for errors apparent upon the face of the record will not lie after the time within which a writ of error could be brought; for courts of equity govern themselves in this particular by the analogy of the common law in regard to writs of error." Story's Eq. Pl. sec. 410; *Thomas v. Harvies' Heirs*, 10 Wheat. 146; *Ricker v. Powell*, 100 U. S. 109; *The Pacific R. R. Co. v. The Missouri Pacific R'y Co.* 2 McCrary, 228.

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It is apparent from these authorities that the original decree of foreclosure cannot be attacked in this proceeding. It must stand as final. It did not provide for redemption, but it was not void on that account. It may have been erroneous, and the error might have been corrected, either upon appeal within two years or by the filing of a bill of review within the same time.

As neither was done within the time required it stands now as a final adjudication. Such being the case, can the complainants have an injunction by reason of anything which appears upon the face of the supplemental decree?

Clearly not, because their complaint rests entirely upon the allegation that the proper provision was not made by the supplemental decree for the redemption of the property sold under the original decree. Inasmuch as at the time that they filed their bill of review their right of redemption had been absolutely lost, unless it be derived from the supplemental consent decree, it is clear that they were not injuriously affected by that decree. Whatever provision it contained upon the subject of redemption was in the interest and for the benefit and advantage of the present complainants. If their prayer should now be granted and the supplemental decree, so far as the provisions therein contained respecting redemption, were abrogated, it would leave them concluded by the original decree and altogether deprived of the right of redemption. So far as the provisions contained in the bill charging fraud are concerned, they all relate to the action of Barcroft, as the attorney of complainants, in consenting to the supplemental decree, and especially to the provisions in relation to redemption. As these provisions are all in the interest of complainants, they cannot be held to have been fraudulent as to them. Besides, I am satisfied that the evidence does not show any intent on the part of Barcroft to defraud, nor does it show to my satisfaction that he acted without authority. If it were necessary to decide that question, I should hold that Barcroft acted in good faith

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and with the knowledge and consent at least of complainant J. C. Taylor, who, it may have been reasonably assumed, represented his wife's interest as well as his own.

The charge of fraud, therefore, must be eliminated from the case; and this being done, the bill, considered as a bill of review to modify or reverse both the original and supplemental decrees, stands merely as a bill of review upon the errors apparent upon the face of the record; and so considered, it is filed too late to reach even the supplemental decree, which was rendered November 1, 1878, while the present bill of review was filed in May, 1881, after the period for an appeal from either the original or supplemental decree had expired. If, however, it be conceded that the charge of fraud is established as to the supplemental decree, and that the arrangement therein specified with respect to redemption was unauthorized and void, as I have already said, this would leave the original decree ordering a sale of the premises without redemption in full force to fix and determine the rights of the parties. When the bill of review was filed both the original and supplemental decrees had by lapse of time become final and conclusive, unless attacked for fraud, and as to the original decree, no attempt has been made to charge fraud. It is said that Taylor and wife were not advised as to the terms of the supplemental decree respecting redemption until after the year had expired. If this were proved (I do not think that it is), it would not avail them, for they were bound to know what was done and spread upon record in a case to which they were parties. *Putnam v. Day*, 22 Wall. 60.

Whether the complainants have any cause of action against the respondent on account of a misappropriation of the proceeds of the crops grown upon the place during the year given for redemption need not now be considered. It is enough for the present that I hold that the complainants have not shown themselves entitled to an injunction. In reaching this conclusion, I have not considered the question whether it was necessary for the complainants to obtain the leave of

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the court to file this bill of review, nor whether it was necessary that they should have performed the decree before being heard. See *Ricker v. Powell*, 100 U. S. 107, 108, and cases cited. Motion for injunction denied.

LOOMIS *et al.* v. DAVENPORT & ST. PAUL RAILROAD CO. *et al.*
PRICE v. SAME.

(District of Iowa. January, 1882.)

1. VENDOR'S LIEN — EQUITABLE OWNERSHIP OF THE VENDOR. — A person who has purchased real estate and paid for it and has a right to a deed in his own name, and who sells the same to a purchaser and causes conveyance to be made direct to such purchaser by the party from whom he has purchased, has a right in equity to a vendor's lien for the purchase money.
2. SAME — WAIVER OF LIEN BY TAKING COLLATERAL SECURITY. — A vendor's lien is defeated by any act upon the part of the vendor manifesting an intention not to rely upon the land for security; as for example, accepting a separate and distinct security, such as a mortgage or bond or note with security. But where the vendor took the vendee's draft for the purchase money as payment, and not as security, and said draft was not paid by the drawee, it was held that the lien was not waived.
3. SAME — MORTGAGE — AFTER-ACQUIRED PROPERTY. — Where the vendor conveyed land to a railroad company which had previously executed a mortgage covering after-acquired property, *held* that such mortgage became a lien upon such land subject to the claim of the grantor for purchase money. As to after-acquired property the mortgagee is not a purchaser for value.
4. SAME — BONA FIDE PURCHASER — LIS PENDENS. — Where, in a suit in the United States circuit court to foreclose a mortgage upon a railroad, one of the defendants asked and obtained leave to proceed in a state court to establish his vendor's lien upon the road, which he did, and where various other proceedings were had as shown in the opinion in both the courts touching the suit to enforce such vendor's lien, *held*, that a purchaser of the railroad property at the foreclosure sale was charged with notice of the proceedings in both courts.

Hiram Price, complainant in the cross bill, claims a vendor's lien upon a portion of the right of way of the defend-

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ant railroad company in Scott county. Upon hearing at the last term decree was rendered in his favor. Upon application of the Chicago, Milwaukee & St. Paul Railway Company, the matter has been reargued. The material facts are stated in the opinion.

McCRARY, *Circuit Judge*.—The original action was brought to foreclose a mortgage upon the property and franchises of the Davenport & St. Paul Railroad Company, and, among others, the present complainant, Hiram Price, was made a defendant, the bill alleging that he had or claimed some interest in the premises mortgaged. There was a decree of foreclosure on the twenty-third day of October, 1875, and a sale of the mortgaged property was ordered, subject, however, to the following reservation contained in said decree, to wit: "And said sale is to be made subject to any prior liens which may hereafter be established against said property in this court hereafter by any of the parties defendant claiming such lien."

At the time this decree was rendered the said Price had not appeared and answered. At the November rules, 1879, the cause still being undisposed of, default was taken at rules against said Price, but the same was subsequently upon a showing set aside by the court, and he was permitted to file the cross bill now under consideration. Prior to the order setting aside said default, the said Price had with the leave of this court commenced suit in the circuit court of Scott county, Iowa, to enforce his vendor's lien, against the Davenport & Northwestern Railway Company v. Davenport & St. Paul Railway Company and John E. Henry, who had been by the court appointed receiver of the mortgaged property. In that suit there was service of process and an answer by the Davenport & Northwestern Railway Company, and by Henry as receiver. Upon permission being granted to said Price to appear and file his cross bill in this case, he dismissed the proceeding in the state court without

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prejudice. The facts upon which the vendor's lien is claimed, as we find them from the evidence, are as follows:

1. That in the summer of 1873, the said Davenport & St. Paul Railroad Company, being desirous of securing the right of way over the land in controversy, applied to said Price to procure it for them. The company desired that Mr. Price should obtain the right of way, because they believed he could contract for it at lower prices than would be demanded of the company, and for a less sum than would be assessed as damages if the right of way should be condemned.

2. The said Price acceded to said request, and undertook to secure the right of way for the said railroad company as a matter of accommodation and not with a view to any pecuniary reward of profit. He was to be paid for the land what it cost him.

3. At that time the land through which the right of way was to be obtained belonged part to Andrew J. Preston, part to Price, Hornby & Kehoe, and part to a street railway company.

4. For the purpose of carrying out the agreement, the said Price bought the necessary land from all these parties, and paid for it out of his individual funds, the sum of \$2,500. As a convenient mode of conveying title to the railroad company, he secured a conveyance from Preston and the street railway company to Price, Hornby & Kehoe, and from the latter to the railroad company.

5. There was no agreement that Price should receive any thing but cash, or its equivalent, in payment for his expenditures, nor that he should accept any collateral or other security.

6. Afterwards Mr. French, president of said railroad company, gave Price as payment for said right of way a draft, as follows:

" \$2,500.

DAVENPORT, IOWA, July 15, 1873.

" On January 1st, 1874, pay to the order of George H.

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French, president, twenty-five hundred dollars, value received, and charge the same to account of

“DAVENPORT & ST. PAUL R. R. Co.

“By GEORGE H. FRENCH, Pt.

“To DAVENPORT RAILWAY CONSTRUCTION Co., 57 Broadway, New York:

“Indorsed, ‘Accepted, payable at Gilman, Son & Co., New York.

“D’VP’T R’WY CONSTRUC. Co.

“By B. T. SMITH, Pt.”

It was customary at that time for the company to pay debts by drafts upon said construction company, and the parties understood that the draft was given and received as equivalent to cash, and as payment and not as security.

7. Said draft not being paid at maturity, was several times renewed and finally put in judgment against the construction company, but the judgment was never collected and the construction company has become insolvent.

8. In July, 1877, the said Price commenced suit in the circuit court of Scott county, Iowa, to foreclose his vendor’s lien. Due service was made in the same month upon the defendants therein, the Davenport & Northwestern Railroad Company, the Davenport & St. Paul Railroad Company, and John E. Henry, receiver; and on the twenty-sixth day of November, 1877, the answer of the first named company (the real party in interest) and of the receiver was filed. That suit remained pending until the order of this court was made allowing said Price to file his cross bill herein.

9. The suit was brought in the state court against the receiver by permission of this court, and the counsel for the railroad company in that case obtained the default in this court in order to set the same up as a bar to action there.

10. Upon applying for leave to file his answer and cross bill in this case, said Price offered to dismiss his case in the state court upon the granting of such leave, and accordingly did so.

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Upon these facts the counsel for the Chicago, Milwaukee & St. Paul Railway Company, the present owner of the railroad, submits an able and exhaustive argument, in which he insists that the said Price has not shown himself entitled to a vendor's lien. I will consider the propositions relied upon by the counsel in the order in which they are presented in the brief.

1. It is said that complainant was never the owner of said premises, and never sold or conveyed them to the railroad company.

We think, however, that in equity he was the owner. He had certainly purchased the land and paid for it, and had a perfect right to a deed in his own name.

If he chose to consummate his contract with the railroad company, with its assent, by causing the conveyance to be made direct to the company by the parties from whom he had purchased, it certainly cannot follow as a matter of equity that he thereby lost his right to a vendor's lien for the purchase money. No doubt the general rule is that the lien is given to the vendor, the person who owns the title and conveys it; but a court of equity must look to the substance and not to the mere form of the transaction.

We do not think that it is in all cases indispensable that the legal title shall have been vested in the party who claims the lien, nor that the deed or conveyance should have been actually executed by him. If he is the owner of the land in equity and controls the legal title, and if he causes the conveyance to be made, and is entitled to the purchase money, he is entitled to the vendor's lien therefor. *Carey v. Boyle*, Sup. Court of Wis. 1881, 21 Am. Law Reg. p. 208.

2. It is insisted that complainant is not entitled to a vendor's lien because he accepted the draft of the Davenport & St. Paul Railroad Company drawn upon and accepted by the construction company for the amount of the consideration, and thereby waived his right to such lien.

It is true that a vendor's lien is defeated by any act upon

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the part of the vendor manifesting an intention not to rely upon the land for security; as, for example, accepting a distinct and separate security; such as a mortgage or a bond, or note with security. 2 Washburn on Real Property, Book 1, p. 507; 1 Jones on Mortgages, sec. 207 *et seq.*; *Boynton v. Champlin*, 42 Ill. 57; *Gilman v. Brown*, 1 Mason, 190; *Vail v. Foster*, 4 Comstock (N. Y.), 312; *Fish v. Howland*, 1 Paige Ch. 20; *Kirkham v. Boston*, 67 Ill. 599. The question in every case is whether the vendor intended to waive his right to a lien upon the land and to rely upon other collateral or independent security. In this case, as already stated, we find that such was not the intention of the complainant. The draft was taken as payment. The complainant had not agreed to accept anything besides cash or its equivalent. The construction company held the funds out of which the railroad company undertook to make payment. The draft was given as a mode of payment and not for the purpose of securing the payment of the debt. The complainant did not agree to nor intend to loan the purchase money to the railroad company.

3. It is insisted that a vendor's lien in this case cannot be sustained because the conveyance of the lands to the Davenport & St. Paul Railroad Company brought the same under the mortgage foreclosed in this case, which thereupon became a valid and legal lien thereon prior and paramount to any claim for such vendor's lien.

It is true that the mortgage covered after-acquired property, and it certainly attached to the land in question as soon as it was conveyed to the company; but whether such mortgage, as to this after-acquired property, became a lien prior and paramount to that of the complainant for the purchase money, is a question now to be considered. The vendor's lien exists to the extent of the purchase money, not only against the vendee and his heirs, but also against his privies in estate, and against subsequent purchasers who have notice of it either actual or constructive. It also exists against those who take

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a conveyance of the estate without advancing any new consideration, because such persons are not, within the meaning of equity, purchasers for value. 1 Jones on Mortgages, sec. 199, and cases cited. A mortgagee who takes a mortgage as security for a debt contracted at the time is for the purposes of this doctrine to be regarded as a purchaser for value, and the vendor's lien is not good as against him unless he have notice. *Ibid.* sec. 200, and cases cited. "If the mortgage be given merely to secure a pre-existing debt, it will not prevail against the lien. The mortgagee is not then a purchaser in good faith for value."

In the present case the property in controversy is not described in the mortgage; it is included with the mortgaged property only by virtue of the clause in the mortgage covering property subsequently acquired by the mortgagor. As to such after-acquired property is the mortgagor to be regarded as a *bona fide* purchaser for value, or as taking the property *cum onere*?

The decisions of the supreme court of the United States seem to settle this question. *United States v. New Orleans Railroad*, 12 Wall. 362; *Fosdick v. Schall*, 99 U. S. 225; *Myer v. Car Co.* 102 U. S. 1.

In all these cases the rule is laid down without qualification, that "a mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands." "If," says Mr. Justice Bradley in the case first cited, "that property is already subject to mortgages or other liens, the general mortgage does not displace them though they may be prior in point of time. It only attaches to such interest as the mortgagor acquires." And in *Fosdick v. Schall* the court say: "The mortgage attaches to the cars, if it attaches at all, because they are 'after-acquired' property of the company; but as to that class of property, it is well settled that the lien attaches subject to the conditions with which it is incumbered when it comes into the hands of the mortgagor. The mort-

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gagees take just such an interest in the property as the mortgagor acquired; no more, no less." And in *Myer v. Car Co.* the court say, construing the same mortgage now before us: "In *Fosdick v. Schall* we held that a mortgagor whose mortgage embraced property to be acquired in the future was in no sense a purchaser of such property. His rights were not granted after the property was bought by the mortgagor. He got nothing by this provision in his mortgage except what the mortgagor himself had acquired. He paid nothing for his new security. He took as mortgagee just such title as the mortgagor had; no more, no less." It is insisted by counsel for the railway company that these cases lay down a rule applicable only to after-acquired *personal* property; but the language of the court admits of no such limitation. Nor does the principle upon which the court proceeds. That principle is that as to after-acquired property the mortgagee is not a purchaser for value, and it applies with the same force whether such after-acquired property be personal or real.

The character of the property can make no difference. 1 Jones on Mortgages, secs. 157, 158, and cases cited.

The cases cited by counsel may, we think, all be harmonized with these decisions of the supreme court. They are for the most part cases where the question was between the holder of a vendor's lien, on the one hand, and a purchaser or mortgagee who had paid a present consideration in good faith and without notice, on the other. The case of *Pierce v. Railway Company*, 24 Wis. 551, is the only one cited in which the property in controversy was acquired by the mortgagor after the execution of the mortgage, and in that case the contest was between the vendor and the purchaser at the sale under the decree of foreclosure, who was not charged with notice.

Doubtless such a purchaser, who pays the amount of his bid without notice of the vendor's lien, would be regarded as a purchaser for value and entitled to priority, and

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so it was held in the case just cited, the court saying: "It appears that Hunt and Sage purchased the property at the foreclosure sale and have conveyed it, *without notice of any equities of the plaintiff in the premises*, to the defendant company; . . . and that it would be a violation of all principle to permit the plaintiff, after the foreclosure sale and at this late day, to enforce a vendor's lien for the consideration named in the deed given in June, 1856, really seems to us too plain for argument."

There is in the present case a question of notice to the purchaser at the foreclosure sale which will be considered presently. This quotation is here made to show that the decision in the Wisconsin case was placed mainly upon the ground that the purchaser at the foreclosure sale was an innocent *bona fide* purchaser for value, and is, so far, quite consistent with the rulings of the supreme court of the United States above cited. If it contains anything inconsistent with those rulings, we cannot of course follow it.

4. It is next insisted that the Chicago, Milwaukee & St. Paul Railway Company is a *bona fide* purchaser of said premises for value and without notice of the claim of complainant for a vendor's lien thereon. The title of the said company to the premises was derived under the foreclosure proceedings and the foreclosure sale of July, 1879. At that date the present complainant had not answered in this court, but had appeared here and obtained leave to prosecute his claim for a vendor's lien in the state court, and his suit in the state court was then pending against the parties representing the control and ownership of all the mortgaged property.

The record shows that on the sixteenth of August, 1877, Mr. Price presented his petition to this court, asking leave to sue the railroad company and the receiver in the district court of Scott county, to enforce his vendor's lien, and that on the same day that leave was granted. The record of the state court shows that on the twenty-seventh of the same month suit was brought in that court, and that it was prose-

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cuted with reasonable diligence. The effort, at a later date, to obtain a decree by default in this court, while the parties were in good faith and with our assent litigating the question of the vendor's lien in the state court, never met with the approval of this court, and the default obtained at rules was promptly set aside when the facts were brought to our notice.

The court, however, thought that Mr. Price should select one or the other forum, and therefore allowed him to appear and file his answer and cross bill only upon condition that he should dismiss the suit in the state court without prejudice, which he did. It will be seen, therefore, that at the time of the master's sale under the decree in this case, the record of this court showed —

1. That Hiram Price had been made a party.
2. That he had appeared here and stated on the record that he claimed a vendor's lien on the property now in controversy.
3. That he asked and obtained leave to prosecute a suit to enforce that lien in the state court.

And this record was clearly sufficient to charge such purchaser with notice of the suit in the state court.

It is said, however, that the suit in the state court was dismissed, and that therefore the notice was not sufficient.

Ordinarily this would be so; but it must be observed that this case is very peculiar in its facts and circumstances. No suit could be brought in the state court after the appointment of the receiver without the permission of this court. After such permission was granted, as shown by the record in this case, there was sufficient of record to require the purchaser to take notice of the proceedings in both courts. When the case in the state court was dismissed, it was expressly stated in the record that the dismissal was without prejudice to the right of said Price to bring another suit or to prosecute said claim in the United States circuit court for Iowa.

Immediately upon the dismissal of said suit, the complainant filed his answer and cross bill in this suit. The

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record of the state court was of itself notice that this might or would be done. Besides, the purchaser at the foreclosure sale, under the peculiar language of the decree, was bound to take notice of all subsequent proceedings in the case in this court. The decree ordering a sale of the mortgaged property was entered at an early stage of the proceedings, and expressly directed that said sale should be made subject to any prior liens which might thereafter be established against the mortgaged property in this court. But few of the parties defendant had formally claimed such prior liens at the time that decree was entered. No defaults had been entered against any of the defendants, and it was clearly the intention of the court to retain jurisdiction of the case for the purpose of determining what, if any, prior liens in favor of any of the parties defendant should be enforced against the mortgaged property.

The reservation in the decree cannot, with any propriety, be construed as applying only to such defendants as had at that time formally claimed a prior lien. It was intended by the clause of reservation to save and protect the rights and equities of all the parties to the suit as they might thereafter appear. We hold, therefore, that enough appeared upon the record in this court and in the state court to put the purchaser upon inquiry concerning the claim of the present complainant of a vendor's lien upon the mortgaged property, and that, therefore, the Chicago, Milwaukee & St. Paul Railway Company is not a purchaser without notice of said claim.

The conveyance by the marshal to Rutten & Bonn, and by them to the Davenport & Northwestern Railway Company, and by the latter company to the Chicago, Milwaukee & St. Paul Railway Company, the present owner, were all made pending this suit, and each of the purchasers must, upon the principles already stated, be held to notice of the present complainant's rights. He is not estopped by lapse of time and has been guilty of no laches. He brought his suit in due time and has prosecuted it ever since with

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- , due diligence, either in this court or in the state court, with our consent and approval. Upon the whole case, we are constrained to hold that the decree hereinbefore rendered in favor of the complainant was strictly in accordance with equity and should not be set aside.

LOVE, *District Judge*, concurs.

UNITED STATES v. TAYLOR.

(*District of Kansas. March, 1882.*)

1. TRIAL BY JURY IN CRIMINAL CASE — JURY MUST DELIBERATE AND DECIDE.— Under the sixth amendment to the constitution, which guarantees to every accused person the right to a speedy and public trial by an impartial jury, etc., there must be a submission of the case to the jury for their consideration and decision, and the jury must deliberate upon and determine it.
2. SAME — TO WHAT EXTENT THE JURY MAY JUDGE OF BOTH LAW AND FACT.— The right of the jury in criminal cases to pass upon questions both of law and fact is the necessary result of the jury system, so long as the right of the jury to find a general verdict remains; for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both.
3. SAME — SAME — DUTY OF THE JURY TO RECEIVE THE LAW FROM THE COURT.— While the court is the judge of the law, and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the jury to render a general verdict, and thereby to decide on the law as well as the facts.
4. SAME — SAME.— Ruling of Justice Hunt in *The United States v. Anthony*, 11 Blatchford, 200, considered and dissented from.
5. SAME — SAME — RIGHT OF JURY TO DISBELIEVE WITNESSES.— Although the defendant in a criminal case calls no witness to contradict the witness for the prosecution, yet the jury may still judge of the credibility of those witnesses, and may consider whether, upon applying all the tests of manner, clear or confused statement, prejudice, and accuracy of memory, they are to be believed.
6. SAME — SAME — CHARGE TO FIND VERDICT OF GUILTY.— It is error for the court to charge the jury to find a verdict of guilty, even in a case where, in the opinion of the court, guilt is established beyond dispute.

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The defendant was tried in the district court upon an information charging him with having unlawfully exercised and carried on the trade and business of a retail liquor dealer without having paid the special taxes required by law to be paid.

To this information the defendant entered a plea of not guilty, and upon the trial it appeared that he had sold a compound, designated by him as a tonic, composed chiefly of alcohol. Upon the argument of the case to the jury by defendant's counsel, the court instructed the jury that, there being no authority shown to bring the sales within the rule of proprietary medicines, the defendant had shown no defense, and there was no dispute as to the facts, and the defendant, under the evidence, undoubtedly guilty as charged, and thereupon directed the jury, without retiring, to return a verdict of guilty. To this instruction the defendant, by his counsel, excepted, and afterwards moved for a new trial on the ground that the court erred in directing the jury to return a verdict of guilty, which motion was overruled. The giving of the above instruction, and the overruling of the motion for a new trial, are assigned as error.

J. R. Hallowell, United States Attorney, for the United States.

J. H. Gilpatrick, for defendant.

McCRARY, *Circuit Judge*.—The single question to be determined is whether, in such a case as this, a court may direct a verdict of guilty. It is insisted on the part of the government that, the facts being admitted or settled beyond dispute, the question of guilt or innocence depends wholly upon a question of law, which the court must determine, and that, therefore, the court may direct a verdict either way in accordance with its opinion of the law. This is the view which was taken by the court below. In so holding, the learned district judge was, no doubt, largely influenced

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by the ruling of Mr. Justice Hunt in the case of *The United States v. Anthony*, 11 Blatch. 200. I find, however, upon an examination of the subject, that, with this single exception, the authorities are, with entire unanimity, against the right of a court in a criminal case to direct a verdict of guilty.

The constitution guarantees to every accused person "the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed." (VIth amendment.) This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court, by the prisoner's consent, is erroneous. *State v. Mann*, 27 Conn. 281.

It is very difficult to see upon what principle it can be maintained that an accused person has had a trial by an impartial jury, within the meaning of the constitution, in a case where the court has directed the jury, without deliberation, to find him guilty. It would seem that such a trial is, in substance and effect, a trial by the court quite as much as in a case where a jury is waived by consent of the accused.

The constitution does not deal with the form, but with the substance, the essence of the trial, and therefore requires a submission of the case to the jury for their consideration and decision upon it. There can, within the meaning of the constitution, be no trial of a cause by a jury unless the jury deliberates upon and determines it.

It is doubtless true that, in a certain sense, and to a limited extent, this doctrine makes the jury the judges, in criminal cases, of both law and fact, but this is the necessary result of the jury system, so long as the absolute right of the jury to find a general verdict exists, for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both.

It has accordingly long been well settled that, while the court is the judge of the law, and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the

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jury to render a general verdict, and thereby to decide on the law as well as the facts. It has never to my knowledge been claimed that if the jury disregard the law as laid down by the court, and render a general verdict of not guilty, the court can set it aside; and if this cannot be done by an order after verdict, how can the court do substantially the same thing by an instruction before verdict? The action of the court is, in effect, the same in either case; it is in effect a decision by the court upon the law and facts, that the accused is guilty. The court must determine both the fact and the law, whether it directs a verdict of guilty, or sets aside a verdict of not guilty. It may be going too far to say broadly that the jury have a right to disregard the instructions of the court upon questions of law, although many courts have gone to this extent; but it is quite clear that the right to render a general verdict includes the power to decide both law and fact, and therefore necessarily the power to decide independently of the court.

In view of this, courts have usually gone no further than to say to the jury that while they may, by a general verdict, determine both the law and the facts, it is their duty to believe the law as laid down by the court. In the case of *The United States v. Wilson*, 1 Baldwin, 108, the court, by Mr. Justice Baldwin, in charging the jury, commented upon the subject as follows:

“In repeating to you what was said on a former occasion to another jury, that you have the power to decide on the law as well as the facts of this case, and are not bound to find according to our opinion of the law, we feel ourselves constrained to make some explanations not then deemed necessary, but now called for from the course of the defense.

“You may find a verdict of guilty, or not guilty, as you think proper, or may find the facts specially and leave the guilt or innocence of the prisoner to the judgment of the court. If your verdict acquits the prisoner, we cannot grant a new trial, however much we may differ with you as to the

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law which governs the case, and in this respect the jury are the judges of the law, if they choose to become so. Their judgment is final, not because they settle the law, but because they either think it not applicable, or do not choose to apply it to the case.

“But if a jury find a prisoner guilty against the opinion of the court on the law of the case, a new trial will be granted. No court will pronounce a judgment on a prisoner against what they believe to be the law. On an acquittal there is no judgment, the court do not act, and cannot judge, there remaining nothing to act upon.

“This, then, you will understand to be what is meant by your power to determine upon the law; but you will still bear in mind that it is a very old, sound and valuable maxim in law, that the court answers to questions of law, and the jury to facts. Every day's experience evinces the wisdom of this rule.”

That this charge presents the true doctrine upon the subject will be apparent from an examination of the following authorities, all of which sustain it, and some of which go even beyond it, and declare that the jury are the exclusive judges of both law and fact in a criminal case. Several of them are exactly in point, holding that a direction to the jury to convict is erroneous, notwithstanding overwhelming evidence of guilt. *United States v. Battiste*, 2 Sumner, 243; *Commonwealth v. Peter*, 10 Met. (Mass.) 262; *Pierce v. The State*, 13 N. Y. 536; *Carpenter v. The People*, 8 Bail. 603; *Commonwealth v. Tuyl*, 1 Met. (Ky.) 1; *United States v. Stockwell*, 4 Cr. C. C. 671; *Selstmius v. United States*, 5 Cr. C. C. 573; *Montee v. Commonwealth*, 3 J. J. Marsh. I, 32; *Howell v. People*, 5 Hand. (N. Y.) 620; *Sims v. State*, 43 Ala. 33; *United States v. Hodges*, 2 Wheeler Cr. Cases, 477; *United States v. Wilson*, Baldwin, 78; *United States v. Fenwick*, 5 Cr. C. C. 562; *United States v. Greathouse*, 2 Abbott (U. S.), 364; 4 Blackstone Comm. 361; *Tucker v. State*, 57 Ga. 503; *Hoffman v. State*, 29 Ala. 40; *Perkins v. State*, 50 Ala. 154.

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The rule is thus stated in *Commonwealth v. Tuyl*: "The jury must derive a knowledge of the facts from the witnesses, and of the law from the court. They have, however, to pass upon both, and by making an application of the law to the facts of the case, decide whether the offense charged in the indictment has been committed. In this sense only, are they the judges of the law of the case."

With respect to the ruling of Judge Hunt in *The United States v. Anthony*, *supra*, it is proper to remark that he seems, upon reflection, to have doubted its soundness, as on the subsequent trial of the officers of election indicted with Miss Anthony for the same offense, and in which substantially the same testimony was introduced, he stated that, instead of ordering a verdict of guilty, he would submit the case to the jury with the instruction that there was no justification for the act of the defendants, and that in effect they were all guilty. See Wharton Crim. Law, seventh edition, section 82a.

It is now well settled in the federal courts, that, in civil cases where the facts are undisputed, and the case turns upon questions of law, the court may direct a verdict in accordance with its opinion of the law; but the authorities which settle this rule have no application to criminal cases. In a civil case, the court may set aside the verdict, whether it be for the plaintiff or defendant, upon the ground that it is contrary to the law as given by the court; but in a criminal case, if the verdict is one of acquittal, the court has no power to set it aside. It would be a useless form for a court to submit a civil case involving only questions of law to the consideration of a jury, where the verdict, when found, if not in accordance with the court's view of the law, would be set aside. The same result is accomplished by an instruction given in advance to find a verdict in accordance with the court's opinion of the law. But not so in criminal cases. A verdict of acquittal cannot be set aside, and, therefore, if the court can direct a verdict of guilty, it can do indirectly that which it has no power to do directly.

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By his plea of not guilty, the defendant must be understood as denying the truth of the information or indictment, and as not conceding the truth of what the witnesses for the government have sworn to. This is so, notwithstanding the fact that no witness for the defendant contradicted the statements of the witnesses for the prosecution.

In this condition of the testimony, it was the right of the jury to pass upon the credibility of the witnesses, even if unimpeached as to character, and to consider whether, upon applying all the tests of manner, clear or confused statement, prejudice, and accuracy of memory, they were to be believed. It was within the province of the jury to disbelieve the witnesses for the government. And even in civil cases, so far as I know, no judge has ever gone further than to say, when the case was at all dependent upon oral testimony, that if the jury believed all the testimony, they should find for the plaintiff or defendant.

The present case, in itself considered, is of little consequence, but the question involved is of far-reaching importance, for if the power to direct a verdict of guilty exists in this case, it exists and may be exercised in any criminal case, however important, and even if the punishment be death. In view of this, and especially in view of the opinion above cited of Mr. Justice Hunt, for whose judgment I entertain the highest respect, I have considered the case with great care. I have also consulted Mr. Justice Miller, who authorizes me to say that he concurs in the conclusion which I have reached, which is, that the district court erred in charging the jury to find the defendant guilty, and in overruling the motion in arrest of judgment.

The judgment of the district court is accordingly reversed, and the cause remanded for further proceedings in accordance with this opinion.

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WALKER v. FLINT and others.

(Eastern District of Missouri. March, 1882.)

1. **PLEADING — GENERAL DENIAL.**— A general denial is not equivalent to a general issue at common law. It only puts the plaintiff to proof of his substantial allegations. If the defendant has an affirmative defense in the nature of an avoidance, he should plead it.
2. **SAME — STATUTE OF LIMITATIONS.**— The statute of limitations cannot be set up as a defense under a general denial.
3. **REAL PROPERTY — ESTOPPEL.**— Where A. erected one wall of an expensive building upon land to which he believed he had good title, but which was really owned by B., and B., with full knowledge of the fact that said wall was being erected, failed to claim any interest in the land or make any objection to the erection of said wall thereon, *held*, that he was thereafter estopped to claim title to the ground upon which the wall stood.

Ejectment. Demurrer to answer.

This is a suit to recover a strip of land two and one-half feet in width by one hundred and thirty-seven feet in depth, alleged by plaintiff to be a part of a lot set apart to him in certain proceedings in partition, to which the Life Association of America was a party. The plaintiff alleged in his petition that after the decree was made in said proceedings, allotting said land to him, said association erected a building, partly upon adjoining property and partly upon the land in controversy, and leased it to Coan & Flint (defendants); and that said association was thereafter dissolved and its property transferred to Relfe (the other defendant), state superintendent of insurance, to whom said lessees thereupon attorned. The defendants made a motion to dismiss as to Relfe, but it was overruled. They then filed an answer in which they —

(1) Denied each and every allegation of the petition, and alleged:

(2) That neither the defendant nor any one under whom he claimed had been seized or in possession of the premises in controversy within ten years before the commencement of the action.

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(3) That the defendants and their grantors have been in open, notorious and continuous possession of the premises, under claim and color of title thereto adversely to the plaintiff and to all the world, for a period of more than ten years next prior to the inception of this suit.

(4) That the premises have been occupied by one Walker—under whom plaintiff claims title—for a term of twenty-one years and six months,—from January 1, 1847,—under a lease from the party under whom defendants claimed, and that said Walker had surrendered said premises at the expiration of his term.

(5) That said association erected the building alleged to have been erected by it in good faith, and without any notice or knowledge of any claim on the part of the plaintiff or his ancestor, and with the knowledge of plaintiff and those under whom he claims, that the south wall of said building stands upon the strip of land in controversy, and that its removal would cause great and irreparable damages.

(6) That the defendants should not be estopped by reason of the decree obtained in the partition proceedings referred to, because at the time of the said partition proceedings said association was not the owner of the land in controversy, and was not made a party by reason of any claim thereto.

The plaintiff demurred to the answer on the ground that the matters alleged in the special defenses may be given in evidence under the general denial.

Sansum & Jones, for plaintiff.

Lee & Chandler and *Carr & Reynolds*, for defendants.

TREAT, *District Judge*.—The main question is as to estoppel *in pais* alleged in the answer, while the petition avers on the other hand, substantially, an estoppel by record. The petition sets out with great fullness the sources of plaintiff's title, and by anticipation negatives any question of estoppel or limitation which defendants may aver. The main ground of

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plaintiff's averments as to estoppel of record relates to the fact that the Life Association of America, the landlord defendant, was a party to the partition suit, while the answer of the defendants directs attention to the alleged fact that said partition suit was for many parcels of property, in one only of which that association was interested, and that was a parcel of ground in Carondolet, miles away from the *locus in quo* in this case. The answer then avers further that said association, with full knowledge of the plaintiff, proceeded, after having acquired possession of the abutting property of plaintiff, to erect thereon an expensive building, without objection, and that now plaintiff's demand would be, if upheld, disastrous, far beyond the value of the two and one-half feet of land in question. The property subsequently acquired by the association was not property involved in the partition suit, but was an abutting tract.

Is a party to a partition proceeding, who subsequently acquires adjoining property not involved in the partition suit, estopped from disputing the calls in such a proceeding for lands included therein, when he thereafter becomes the grantee of adjoining property? Thus the defendant landlord had no interest in plaintiff's lot now claimed, but became a party to the suit in partition to protect its interests in a tract miles away. After partition had, it purchased a tract far away, which adjoins what had been set apart to plaintiff. Having become the owner of said adjoining tract, he was not estopped by the record in partition, and if it be true that, after such purchase, it proceeded with full knowledge and without objection of plaintiff to erect an expensive edifice, which possibly trespasses to the extent named on plaintiff's property, is there not an estoppel *in pais*?

The first defense is a general denial. It is contended that under such denial the defendants can rely on the statutes of limitation, and therefore that the two defenses pertaining to limitations are improper. The uniform ruling of this court has been that a general denial under the code is not equiv-

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alent to a general issue at common law, whereby certain affirmative or *quasi*-affirmative matters can be heard. A general denial puts the plaintiff to the proof of his substantive allegations, upon which his right of recovery depends. If the defendant has an affirmative defense in the nature of an avoidance, he must plead it. In this case, in conformity with such rulings, the defense is in the first special plea one state of facts, and in the second plea another state of facts, either of which, if true, would defeat the plaintiff's alleged cause of action. Each is well pleaded, and no demurrer thereto can prevail.

The other defense is more difficult; but what has been stated above explains the views of the court as to estoppels of record and estoppels *in pais*. If the averments with respect thereto are well founded, they constitute a valid defense.

In a former opinion of this court there was a *dictum* based on the then state of pleadings; but now a different showing is made, raising other and substantial issues: *First*, as to the alleged estoppel by record; and *second*, as to estoppel *in pais*.

Hence the demurrer to the special defenses in the answer are overruled.

PELCHER and others v. UNITED STATES.

(*District of Minnesota. March, 1882.*)

1. GOVERNMENT — INDIAN COUNTRY.—Section 1 of the act of congress of June 80, 1834 (4 St. at Large, 729), defining the "Indian country" as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river and not within any state, to which the Indian title has not been extinguished," was repealed by section 5596, R. S., and consequently the description of the "Indian country" found in section 1 of the act of 1834 is no longer a part of the law of

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the land. The question as to what is the Indian country, since the repeal of said section, not decided.

2. **SAME — SEIZURE OF LIQUORS.**— A search for and seizure of liquors under the provisions of section 2140, R. S., which provides for the enforcement of a penalty and forfeiture for introducing spirituous liquors and wines into the Indian country, in a case where the liquors found were not claimed to have been seized within the limits of an Indian reservation, was *held* unauthorized.

On writ of error from district court.

This action is brought up for review from the district court of the district of Minnesota on writ of error. The proceedings in the lower court were instituted under the provisions of section 2140, R. S., which empowers certain United States officers to search for and seize any spirituous liquors or wines introduced or about to be introduced into the "Indian country," and if any such be found, to seize the same, and all the conveyances used in introducing the same, as well as all the goods, packages and peltries of such persons so introducing the same; to be proceeded against by libel in the proper court as forfeited, one-half to the informer, and the other half to the United States.

Section 2140, R. S., provides for the enforcement of the penalty for the violation of the provisions of the preceding section, which prohibits the introduction of spirituous liquors or wines into the "Indian country;" and it was contended in this case, by the prosecution, that the territory known as the "Northwestern Angle," on the northern extremity of Minnesota, where the liquor was found, is a part of the "Indian country" into which the statute prohibits the introduction of such commodities.

C. K. Davis, for defendant in error.

Mr. Congdon, Assistant District Attorney, for the United States.

McCRARY, Circuit Judge.— The point most discussed on the hearing is one which was not brought to the attention of

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the court below, but which may nevertheless be raised here, as it goes to the question whether there is any statute of the United States now in force which locates and defines the extent or boundaries of the Indian country. The first section of the act of congress of June 30, 1834 (4 St. 729), defines the Indian country as follows: "All that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river and not within any state, to which the Indian title has not been extinguished." There is no other statutory definition or description of the Indian country. Our first inquiry will be, is the first section of the act of June 30, 1834, still in force, or has it been repealed by the enactment of the Revised Statutes of the United States? The section is not found, either in form or substance, re-enacted in the revision. It is entirely omitted therefrom. Other portions of that act are embodied in the revision, as will be seen by reference to sections 2129, 2130, 2131, 2132, 2133, 2134, and 2155.

The Revised Statutes, § 5596, provide that "all acts of congress passed prior to said first day of December, 1873, any portion of which is embraced in said revision, are hereby repealed, and the section applicable thereto shall be in lieu thereof; all parts of such acts not contained in said revision having been repealed or suspended by subsequent acts, or not being general or permanent in their nature: provided that the incorporation into said revision of any general or permanent provision, taken from an act containing other provisions of a private, local or temporary character, shall not repeal or in any way affect any provision of a private, local or temporary character contained in any of said acts, but the same shall remain in force," etc.

It is plain that the first section of the act of 1834 is repealed by this legislation, unless it comes within the proviso just quoted, as being in its nature private, local or temporary.

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The act of 1834, known as the trade and intercourse act, considered as a whole, was, in my judgment, a public act, permanent in its character, and of great general importance. It was neither local, private nor temporary, within the ordinary signification of those terms, as used in the acts of congress. It established an elaborate and comprehensive code, regulating trade and intercourse with the Indian tribes, and provided for the punishment criminally of all persons violating any of its provisions. Looking at the entire act, no lawyer would think of classing it among the statutes usually denominated local, private or temporary. But it is said that while the general provisions of the act are of a public and general character, the first section is both local and temporary.

It is insisted that the said section is local, because those parts of the acts dependent upon it for their applicability are by said section limited to a portion of the United States, and not to the whole. This point is not well taken. The statute concerned all the people of the United States. It bound all within the jurisdiction of the law-making power, although its operation may have been limited to the territory described. The proper definition of a private or special statute is one which relates to certain individuals or particular classes of men. Statutes which relate to matters of public policy, as contradistinguished from those which relate to private interests and particular individuals only, are public acts; and hence it has been held that statutes for the establishment of towns and counties, the erection of court-houses, bridges and ferries, and the like, are public acts. So, also, are acts which, though affecting a particular locality, apply to all persons. Upon this general subject see Sedgwick, St. & Const. 30 to 33, inclusive; *Clark v. City of Janesville*, 10 Wis. 186; *Iowa County Seat Case*, 9 Wis. 279.

It follows that whether we consider section 1 of the act of 1834 by itself, or (as I think we must) as a part of the entire act, and therefore as constituting a part of a code or system of laws, it must in either case be held that it is a general

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and not a local statute. Is it in its nature a temporary statute? Generally speaking, a permanent statute is one which is understood to continue in force till its repeal; and it is argued that because this section may, at some time in the future, cease to have any force and effect, or, in other words, become obsolete by the extinguishment of the Indian title to all lands within the United States, therefore it is temporary and not permanent within the meaning of section 5596 of the Revised Statutes. I am unable to concur in this view. It is evident that congress did not use the word "permanent" in this sense, but rather as applying to all acts of congress of a general and public nature which were in force on the first day of April, 1873, and which were so far permanent as that, if not repealed or re-enacted, they would have continued in force as the law of the land for an indefinite period of time.

The purpose of the revision was to bring together in one volume all the statutory laws of the United States, except such as did not concern the whole country by reason of their being private, local or temporary in their nature. The Code of Criminal Law for the punishment of offenses within the Indian country, as long as any Indian country shall exist within the jurisdiction of the United States, was, in my opinion, a permanent statute, within the meaning and intent of congress. I am constrained, therefore, to hold that section 1 of the act of 1834 was repealed by the Revised Statutes of the United States, and that consequently the description of the Indian country found in that section is no longer a part of the law of the land.

What, then, are we to understand by the words "Indian country" as used by congress in the statute under which this proceeding was instituted, and in the various other acts of congress; as, for example, in sections 2064, 2127, 2129, 2131 to 2149, inclusive, 2152, 2153, 2154, and 2156? I am not prepared to deny the proposition that these words must be held to have a meaning; nor do I say that it may not be the duty of the court in a proper case to determine what the

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meaning is, since congress has used the words without defining them. It may be a question of considerable nicety, as it certainly is a question of great importance, whether in a criminal or *quasi*-criminal proceeding a court can undertake to say what parts of our vast territorial domain come within the description. Upon one point, however, I am clear, and that is all that I am called upon to decide. If necessity required the court to determine the meaning of the words the "Indian country," in the absence of any statutory definition, I should, in a criminal case, in obedience to the rule which requires that the words in a penal statute shall be construed strongly in favor of the accused, hold that the Indian country is that portion of the public domain which is set apart as a reservation or as reservations for the use and occupancy of the Indians, and not the whole vast extent of the national domain to which the Indian title has not been extinguished. I do not say that I would in any criminal case undertake to define the meaning of the words "Indian country" as used in the statutes of the United States, but I do say that the meaning just suggested seems to me more reasonable than the one insisted upon by the district attorney in this case; and for that reason, as well as because of the penal character of the statute, I should feel constrained, if I were to define these terms at all, to construe them as synonymous with Indian reservations.

In this case it is not claimed that the liquor was seized within the limits of an Indian reservation, and it follows, according to the view I have taken of the statutes, that the seizure was unauthorized.

Without, therefore, discussing any of the other questions raised by counsel, as this conclusion is decisive of the case, it is ordered that the decree of the district court be reversed, and the cause be remanded to that court for further proceedings in accordance with this opinion.

NOTE.¹ — Congress may exercise its power to regulate commerce with the Indian tribes to the same extent as with foreign nations. *U. S. v.*

¹ From *Federal Reporter*.

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Cisna, 1 McLean, 254. The power to regulate intercourse between the tribes and individual Indians includes the power to prohibit the traffic in spirituous liquors. *U. S. v. Shaw-mux*, 2 Sawy. 364. The power may be exercised, although the traffic is wholly within the territorial limits of a state. *U. S. v. Holliday*, 3 Wall. 407. When the Indian territory is within the limits of a state, congress is limited to the regulation of commercial intercourse with such tribes as exist as a distinct community, governed by their own laws, and resting for their protection on the faith of treaties and laws of the Union (*U. S. v. Bailey*, 1 McLean, 234; *U. S. v. Cisna*, id. 254; *State v. Foreman*, 8 Serg. 256) and the state cannot withdraw them from the operation of the laws of congress. *U. S. v. Holliday*, 3 Wall. 407. Indians on a reservation within a state are not citizens or members of the body politic, but are considered as dependent tribes, governed by their own usages and chiefs. *Holden v. Joy*, 17 Wall. 211; *Goodell v. Jackson*, 20 Johns. 693; *Jackson v. Wood*, 7 Johns. 290; *Strong v. Waterman*, 11 Paige, 607. So the liability of an inn-keeper on an Indian reservation within the limits of a state is to be determined according to the laws of the tribe. *Horland v. Pack*, Peck (Tenn.), 151. Where the country occupied by Indians is not within the territorial limits of a state, congress may provide for the punishment of offenses there, no matter by whom committed. *U. S. v. Rogers*, 4 How. 567. The carrying of spirituous liquors into a territory purchased by the United States after March 30, 1802, although frequented and inhabited exclusively by Indians, is not an offense within the meaning of the acts of congress so as to subject to forfeiture. *American Fur Co. v. U. S.* 2 Pet. 358. If Indians occupy territory of very limited extent, surrounded by a white population which necessarily have daily intercourse with them, and it becomes impracticable to enforce the law, the federal jurisdiction must cease. *U. S. v. Cisna*, 1 McLean, 254. The circuit court having concurrent jurisdiction with the district court over crimes, has jurisdiction over the offense of selling liquor to Indians, although jurisdiction may be vested by statute in the district court. *U. S. v. Holliday*, 3 Wall. 407.

Allen, West & Bush v. Clayton & Prewitt.

ALLEN, WEST & BUSH v. CLAYTON & PREWITT.

(*Eastern District of Arkansas. March, 1882.*)

1. ATTACHMENT SUIT — JOINT LIABILITY — SEPARATE PROPERTY.—

Where the state code provides that judgment may be rendered “for or against one or more of several defendants,” according as the proof may warrant, it is a provision as applicable to suits by attachment as to suits in any other form; and where an attachment is sued out against two persons jointly, it may be sustained as against the separate property of one alone.

CALDWELL, *District Judge*.—The defendants were partners in the mercantile business, and as such became indebted to the plaintiffs, who sued the defendants jointly by their individual names for said indebtedness, and at the same time sued out an attachment in the suit, alleging that “the defendants had sold and conveyed their property with the fraudulent intent to cheat, hinder and delay their creditors.” Issue was taken on the affidavit for the attachment, and on the trial of that issue it appeared that Clayton, one of the defendants, had made such a disposition of his individual property as the affidavit alleged had been made by the defendants jointly, and that the writ of attachment was levied on the individual property of Clayton.

Upon this state of facts the question arises whether the attachment can be sustained as to both or either of the defendants. For the defendants it is argued that the affidavit for attachment counts on their joint act in fraudulently disposing of joint property, and that, as the proof relates to the action of one of the defendants only in relation to his individual property, there is a fatal variance between the allegation and the proof, and the attachment must fall—that it must fail as to both defendants, because there is no proof to support the allegations of a joint fraudulent disposition of joint property, and that it must fail as to the defendant Clayton, because there is no allegation to which the proof can be referred.

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If the common law in relation to joint contracts and the common-law rules of pleading were still in force, the position assumed by the learned counsel for the defendants would be sound. But by section 3587, Gantt's Digest, it is provided that joint obligations shall have the same effect as joint and several obligations, and may be sued on and recoveries had thereon in like manner; and the code contains these provisions:

"Sec. 4480. Where two or more persons are jointly bound by contract, the action thereon may be brought against all or any of them, at the plaintiff's option. . . .

"Sec. 4701. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants.

"Sec. 4704. Though all the defendants have been summoned, judgment may be rendered against any of them severally, where the plaintiffs would be entitled to judgments against such defendants if the action had been against them alone."

The chapter relating to attachments is part of the code, and the provisions of the code relating to pleadings and judgments apply to attachment suits as well as any other. Sections 4446, 4557. It is expressly provided that when issue is taken on the attachment "the affidavits of the plaintiff and defendant shall be regarded as the *pleadings* in the attachment, and have no other effect" (section 457); and the power to amend is the same in attachment suits as in others. *Tilton v. Colfield*, 93 U. S. 163; *Rogers v. Cooper*, 33 Ark. 406. Under the provisions quoted, the debt upon which the attachment was sued out was the joint and several debt of Clayton & Prewitt, and their joint and individual property might be attached to satisfy it. A complaint against two or more jointly on a cause of action joint in form is a good complaint against the defendants jointly and severally, and a recovery may be had against one or all, according to the proof. Attachment suits cannot be excepted

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from the operation of this rule. The provision of the code is explicit that judgment may be rendered "for or against one or more of several defendants," according as the proof may warrant, and this provision is as applicable to suits by attachment as to suits in any other form. Section 388, (Gantt's Dig., subd. 9. The plaintiffs prove a good ground of attachment against the defendant Clayton, whose property has been attached, and the attachment is sustained as to him and his property. If the joint property had been attached a different question would have been presented, upon which no opinion is expressed.

W. S. McCain, for plaintiffs.

John A. Williams, for defendants.

THE TIMBER CASES.

(*Western District of Missouri. September, 1881.*)

1. **PUBLIC LANDS—RIGHTS OF SETTLERS.**—Where a person enters upon public land with the view of pre-empting it, and before the expiration of the year during which he ought to have proven up his claim he homesteaded his pre-emption, the pre-emption as well as the homestead must have been taken in good faith for the purpose of residence, settlement and improvement.
2. **SAME—RIGHT TO CUT TIMBER.**—A person entering on the public land for the purpose of pre-emption, or to secure a homestead, in good faith, may cut the timber standing thereon for the purposes of cultivation, and after applying such portion as can be used for the improvement, he may sell or dispose of the balance.
3. **SAME—RESTRICTION AS TO RIGHT.**—A settler on the public lands has no authority to go outside of the improvements, cut or sell timber, and thus denude the land and destroy the value of the public domain, even though he intends to acquire the title under his claim.

KREKEL, District Judge (charging jury).—The laws of the United States invite settlement on public lands for the purpose of acquiring homesteads. While doing so they seek

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to protect the timber, often constituting a valuable part of the land, so that the pre-emptor may obtain the full benefit intended. The law will not allow injury to the value of the land under either the pre-emption or homestead law. In the case before you, the defendant first pre-empted the land, and before the expiration of the year, during which he ought to have proven up his claim, he homesteaded his pre-emption, thus obtaining an extension of time within which to acquire his homestead at a greatly reduced rate of cost. Whether such a proceeding was contemplated by the law it is unnecessary to determine, but I am inclined to think that it is at least within the spirit of the act. Both the pre-emption as well as the homestead must, however, have been taken in good faith; that is, for the purpose of residence, settlement and improvement. Residence on the land alone, without intention of acquiring the land as a homestead, will not answer the purpose. From the testimony in the case you will have to determine whether the entry on the land claimed by pre-emption or homestead was for permanent residence and for cultivation, or for the purpose of cutting and selling of timber. A pre-emption or homestead claimant may cut timber needed for the improvements he is or contemplates making.

The timber standing on the land intended for cultivation the claimant may cut, and after applying such portion as can be used, and is needed for the improvement for that purpose, he may sell or dispose of the balance to the best advantage. The law is not so unreasonable as to require timber which has to be removed for the purpose of cultivation to be burned or otherwise wasted, but will allow the pre-emptor to have the benefit of it to aid him in accomplishing the design of the law. A settler on the public lands cannot, however, go outside of the improvements, cut and sell timber, even though he intends to acquire the title under his claim, for he might at any time change his intention after the timber is taken, and thus defeat the object of the law. The length of time

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the defendant has been on the land pre-empted or homesteaded, the character of the buildings erected by him, the work done towards making fields and improvements for farming, if any, the quantity and quality of the timber cut and sold, and the place or places where cut, whether the claimant was relying on cutting and selling timber for a living rather than on farming,—in fine, everything pertaining to the case is to be carefully examined by you in order to arrive at the good or bad faith with which the defendant held the possession of the land and did the acts complained of. The law presumes that he acted in good faith, and it is only when you are satisfied from the testimony and circumstances of the case that he did not so act, that you can find him guilty. The pre-emption and homestead laws should not be made use of to destroy the value of the public domain, and make it less valuable to those for whom the same is primarily intended; namely, the settler and occupier.

The jury found the defendant guilty in the case tried.

MELCHERT v. AMERICAN UNION TELEGRAPH CO.

(District of Iowa. January, 1882.)

1. **OPTION DEALS.**—Contracts for the sale of property to be delivered at a future time at the plaintiff's option, where it was not the intention of the parties that the property should be delivered either by consignment or the transfer of warehouse receipts, but that said contracts should be adjusted and settled by the payment of differences, are void.

This case was submitted by counsel to the court for trial without a jury. It is an action in which the plaintiff claims damages resulting from the alleged negligence of the defendant in transmitting a telegram from Davenport, in the state of Iowa, to the plaintiff's factor in Chicago. It appears that the plaintiff had, in the months of July and August, 1880,

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made, through his factor in Chicago, certain contracts for the sale of some fifteen thousand bushels of rye at sixty-five and one-half and sixty-eight and one-half cents, to be delivered at the plaintiff's option during the month of September in the same year. On the eighth day of September, 1880, the plaintiff delivered to the operator of the defendant's line, at Davenport, at ten o'clock A. M., a dispatch directed to his factor, operating on the board of trade, Chicago, a message directing him to "cover rye as best he could," suggesting "that if he could buy cash he could save more;" adding, "if possible, cover immediately." It does not appear that the plaintiff gave any explanation to the operator of the object, importance, or meaning of the telegram, and it is evident that the operator was wholly uninformed as to the contracts of July and August. The defendant's direct line to Chicago being in trouble, the operator sent the message over its line indirectly by way of Omaha and St. Louis. The message, in its regular course, would have reached Chicago in ten or fifteen minutes from the time of its transmission at Davenport; but it did not, in fact, reach its destination till two o'clock and forty-five minutes in the afternoon. It was delayed in the office at St. Louis in consequence of some trouble in the defendant's line between that city and Chicago. The operator at Davenport received the message without notifying the plaintiff that the direct line was in trouble, and it does not appear that the office at St. Louis informed the office at Davenport of the delay occurring there. The plaintiff was in the defendant's office at Davenport in the course of the day, manifesting anxiety about the message, but received no information from the defendant's employees about the delay or the cause of it. The office of another telegraph line, over which the message could have been sent, was near at hand, but the plaintiff, not knowing of the delay, did not, of course, resort to that line. It appears that when the message reached the plaintiff's factor in Chicago the board of trade had adjourned for that day, and

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that it was then too late to do what the message directed to be done. The factor understood the message to direct him to purchase rye on the board of trade to cover the contracts of July and August. The price of rye required for that purpose was, on the board of trade, eighty to eighty-three cents per bushel up to the time of adjournment, on the eighth of September. Of course, no rye was purchased in pursuance of the telegraphic message on the eighth of September. Rye advanced on the ninth of September to eighty-five cents per bushel, and on the ninth and tenth the plaintiff's factor settled the contracts of July and August by "paying the differences in money value." The result was that the plaintiff lost the differences between eighty cents per bushel and eighty-five cents upon fifteen thousand bushels of rye, amounting to \$750; which sum he claims as damages in this action.

Stewart & White, for plaintiff.

S. E. Brown, for defendant.

LOVE, *District Judge*.—Several questions were argued at the bar, which, with my view of the case, I consider it unnecessary to decide. There is one view which is, in my judgment, entirely conclusive of the controversy. Assuming that the alleged negligence has been satisfactorily established, it is evident that we must proceed to inquire whether or not the contracts of July and August, 1880, were valid and binding agreements, which the plaintiff was required by law to fulfill. The telegram of September 1880, instructed the plaintiff's agent to "cover rye," and it now clearly appears that these words referred to the two contracts for the sale of rye, to be delivered in September, at the plaintiff's option. The purpose of the telegram was to provide for the fulfillment of these contracts. If they were illegal contracts, the plaintiff was not bound to fulfill them, and he could have suffered no loss from the failure to fulfill them. Nay, if these contracts

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were illegal gambling contracts, within the statute laws of Illinois, it was the plaintiff's plain duty not to fulfill them, and he cannot complain of the defendant's telegraph company that they were not sufficiently diligent in aiding him to perform his unlawful agreements. The contracts in question were for the delivery of rye in the month of September, at the seller's option. A contract for delivery at the seller's option may be valid or invalid. It depends upon the nature of the option as shown in the intention and purpose of the parties. The option may refer to the fact of delivery, or merely to the time of delivery. If it be the intention of the parties that the property shall be in fact delivered, giving the seller's option as to the time of delivery within a certain period, I see no valid objection to such a contract. It is but a contract for sale of property to be delivered in the future, within a given time. But if it be not the *bona fide* intention of the parties that the property shall be in fact delivered in fulfillment of the contract of sale, but that the seller may, at his election, deliver or not deliver, and pay "differences," then the contract is void. Such a dealing amounts to a mere speculation upon the raise and fall of prices. It requires no capital, except the small sums demanded to put up margins and pay differences. It promotes no legitimate trade. Any impecunious gambler can engage in it, with infinite detriment to the *bona fide* dealer. It enables mere adventurers, at small risk, to agitate the markets, stimulate and depress prices, and bring down financial ruin upon the heads of the unwary. It enables the unscrupulous speculator, with little or no capital, to oppress and ruin the honest and legitimate trader. Corners and black Fridays and sudden fluctuations in values are its illegitimate progeny.

The supreme court of Illinois, in *Pickering v. Chase*, held that contracts where the seller has the privilege of delivering or not delivering, and the buyer the privilege of calling or not calling for, the grain, just as they choose, are optional contracts in the most objectionable sense. 79 Ill. 328. The

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question is, what was the intention of the parties in the inception of the contract? For if, in its inception, the contract was *bona fide* — if it was the true intent of the parties that the property should be in fact delivered — it could be no valid objection that they afterwards, at the time for delivery, arranged the controversy between them by the payment of the difference between the contract and market prices. Nevertheless, the subsequent conduct of the parties in dealing with the contract — in adjusting, settling, or fulfilling it — may often, as evidence, cast strong reflected light upon their original intentions in making it.

The contract now in question was made in Chicago, and, being an Illinois contract, its validity must be determined by the law of that state. In the criminal code of that state we find the following:

“Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, shall be fined not less than \$10 nor more than \$1,000, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts, and shall be void.” R. S. 1874, pp. 372, 373, § 138.

In the case of *Tenny v. Foot*, Legal News, November 16, 1878, p. 71, Judge McAllister, speaking of the statute, says:

“The statute was passed from motives of public policy, and to repress an evil; hence it follows, from established rules of law and their analogies in such cases, that, no matter what form the transaction bears as to the terms of the contract, still, if such form be colorable only, and the real intention of the parties be that there is to be no sale of the article — no delivery or acceptance of it — but the transaction is to be adjusted only upon differences, it is a gambling transaction within the statute.”

What, then, was the intention of the parties to the contract in question as to the delivery of the rye? Was it their pur-

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pose in making the contract that there should be delivery of the grain, either by consignment, or by purchase in store and transfer of warehouse receipts? Or was it their intention that the contract should be fulfilled by putting up margin; and paying differences, without any delivery whatever?

In seeking to ascertain the intentions of parties to such transactions as the one under consideration, it is evident that it will not do to place any great stress upon the mere terms of their contract, or upon their own declarations, whether under oath or not. Parties to such contracts will always seek to give them the form and semblance of legality, and all our experience admonishes us to receive with extreme caution, if not absolute distrust, what parties charged with transactions apparently illegal say respecting the innocency of their own intentions.

In this connection it will not be amiss to advert to the just and pertinent observations of Chief Justice Cole, of the supreme court of Wisconsin, in *Barnard v. Backhaus*, found in the Northwestern Reporter of July 23, 1881, p. 596.

“But it is the manifest duty of the courts to scrutinize closely these time contracts, and determine whether they are really intended by the parties to be what their language imports,—real contracts for the future delivery of grain,—or whether, in fact, they are mere bets or wagers on the price at some distant day. It will not do to attach too much weight or importance to the mere form of the instrument, for it is quite certain that parties will be astute in concealing their intentions, and the real nature of the transaction, if it be illegal. It may safely be assumed that parties will make such contracts valid in form; but courts must not be deceived by what appears on the face of the agreement. It is often necessary to go behind or outside of the words of the contract—to look into the facts and circumstances which attended the making of it—in order to ascertain whether it was intended as a *bona fide* sale and purchase of property, or was only colorable. And to justify a court in upholding such

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an agreement, it is not too much to require a party claiming rights under it to make it satisfactorily and affirmatively appear that the contract was made with actual view to the delivery and receipt of the grain; not as an evasion of the statute against gaming, or as a cover of gambling transactions."

We must look at the actions of interested or accused parties, rather than their mere words, to ascertain their real intentions. We must consider what they have done, rather than what they have said, when called to account for their actions. We can best learn what interpretation the parties themselves have put upon their own contract, by considering what they have done under and in pursuance of it, with a view to its settlement or fulfillment.

Considered in this view, do we find that the plaintiff, after having sold fifteen thousand bushels of rye for September delivery, made any preparation whatever, prior to September 8th, for the purchase of rye, either in the country or upon the board of trade? None whatever. But it is equally evident that when, on the eighth of September, rye had advanced to eighty cents, and the plaintiff made up his mind to protect himself, he furnished no money to his factor to purchase rye in store. But he instructed his agent to "cover rye," and do it "immediately." What did he mean by this? Could he have supposed for a single moment that this factor would, without any arrangement whatever, advance \$12,000 to purchase rye for actual delivery? If it was his understanding of the contract that it called for actual delivery, why did he not, seeing that rye had advanced from sixty-five and one-half to eighty cents, and was still rising, remit money, or make some arrangement for money to purchase "immediately?" If he knew that it was the understanding of himself and his vendee that the contract should be settled upon differences, he might well ask his factor to advance the small sum required to pay differences. This would have been nothing extraordinary; and to my mind it is perfectly

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clear that when he said "cover rye," and do it "immediately," he meant that his factor should purchase rye on time for future delivery, to meet his own contracts for September delivery. Then one contract could be made to balance another by the mere payment of differences; and we shall presently see that the plaintiff's factor so understood him, and proceeded to make the purchase accordingly and settle the plaintiff's contracts upon the differences. In this way the plaintiff sought to protect himself against loss which might result from a still further advance in rye. We cannot for a moment suppose that the plaintiff meant to ask his factor to take \$12,000 in cash out of his own pocket and purchase fifteen thousand bushels of rye in store for his protection. He clearly had in view a purchase by which his factor could settle the contracts to be "covered" by the mere payment of differences. No inference opposed to the view here taken by the court, as to the plaintiff's intention to settle his contracts by the mere payment of differences, can be justly drawn from the mere suggestion in his telegram of September 8th to the effect that his factor could possibly save money by "buying cash." Considering that the plaintiff was then already behind with his factor, and had failed even to furnish money to put up margins, it would be preposterous to suppose that he meant to intimate that his factor should advance \$12,000 cash to purchase rye on his account. What he doubtless meant was that money could be saved by purchasing rye for cash delivery instead of time delivery, in which case the differences would be payable in cash at the time of the purchase instead of becoming payable at some future time in September. It was in this way, beyond question, that the plaintiff thought his factor could save money for him when he said, "I think if you would buy cash you save money."

Let us now turn our attention from the principal to the agent—from the plaintiff to Erick Gerstenberg, the factor, by whom the contracts were made and settled. The contracts were made in his name, not in the plaintiff's name.

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Was it Gerstenberg's understanding that it was the intention of the parties that there should be an actual delivery of the grain, or that it should be settled by the payment of differences at the option of the seller? Gerstenberg's testimony has been twice taken, and he has made the best case he could for the plaintiff. Nowhere do we find that the factor ever notified the plaintiff to make consignments, or remit money to purchase in Chicago, or to prepare in any way to deliver the large amount of grain for which the factor was directly and personally responsible. Gerstenberg evidently understood that the contract was to be settled by the payment of differences, and that his responsibility extended no further than the sums which might be required for that purpose. In Gerstenberg's account with the plaintiff, which is exhibited, we find several entries for "differences" charged, paid, and credited. The telegrams tell the same tale. Gerstenberg in one dispatch informs the plaintiff that he is "seven margins behind," and on the eighth of September, after Gerstenberg received orders to protect the plaintiff, to "send margins, sure." If Gerstenberg knew that the contract required actual delivery of grain, why did he not call for money to buy it? What good would mere margins have done for Gerstenberg's protection if he was compelled to make actual delivery? But, on the other hand, if it was Gerstenberg's understanding that the contracts were to be fulfilled by the payment of differences, it was very natural that he should call for margins from the plaintiff. Finally, how were the contracts in question adjusted by Gerstenberg? He had in July and August sold for September delivery, seller's option, ten thousand bushels of rye to the firm of A. M. Wright & Co., and five thousand bushels to another party in his own name, but for the plaintiff's account. On the ninth of September, after this factor had received orders to "cover rye," etc., he purchased from A. M. Wright & Co. fifteen thousand bushels of rye at, I suppose, of course, the then prevailing rate of

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eighty-five cents. Gerstenberg was then, by the form of his contract, to deliver to Wright & Co. ten thousand bushels of rye at sixty-five and a half cents per bushel, and Wright & Co. were bound in terms to deliver to Gerstenberg fifteen thousand bushels at the price prevailing on the ninth of September; that is, eighty-five cents per bushel. But was any rye delivered or intended to be delivered by either party, or was it their understanding that their respective contracts should be settled and satisfied by the payment of differences? How can we judge of their intentions except by considering what they actually did in adjusting their contracts? Is it not just to conclude, in the absence of proof to the contrary, that parties to a contract adjusted according to their understanding of their own intentions in making it? There is no evidence that either Gerstenberg or Wright & Co. ever bought or owned a bushel of rye to deliver under their contracts. They settled by the payment of differences. It is perfectly evident that it was Gerstenberg's purpose, in the purchase of the fifteen thousand bushels from Wright & Co., to lay the foundation of a settlement in that way. Neither he nor Wright & Co. had evidently the least idea of investing money in these respective purchases for actual delivery. This is made further evident by the account which Gerstenberg gives of the remaining five thousand bushels which he had sold in August to another party for September delivery, at sixty-eight and a half cents, on the plaintiff's account. This, he tells us, was settled by a "ring," of which he gives the following account: The party to whom he had sold this five thousand bushels had the same quantity and quality of grain sold to Lyon & Co.; Lyon & Co. had the same thing sold to Nichols & Co., Nichols & Co. to Wright & Co., and Wright & Co. to Gerstenberg, as stated above. Instead of Wright & Co. delivering that rye to Gerstenberg, and Gerstenberg to the other people, and so on, so that eventually it would come back to Wright & Co., Gerstenberg simply paid the

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difference in money value, and "that is what the trade terms a ring."

The reasonings of the supreme court of Illinois in *Lyon v. Culbertson*, 83 Ill. 38, are applicable here:

"Had the agreement required the party, before he exercised the option, to have made an offer, or at least to have shown that he was able to fulfill his part of the agreement, and was willing to do so, then the contract would have conformed to legal principles, etc.

* * * * *

"It is true, the contract speaks of wheat in store, but neither warehouse receipts were offered, nor was it shown that the appellee had any wheat in Chicago, and it could not have been in the contemplation of the parties to deliver or receive it elsewhere, or it would have been so stated in the contract.

"The fact that no wheat was offered or demanded, shows, we think, that neither party expected to deliver any wheat, but in case of default in keeping margins good, or even at the time of delivery, they only expected to settle the contract on the basis of differences, without either party performing, or offering to perform, his part of the agreement; and, if this was the agreement, it was only gaming on the price of wheat, etc.

"A contract to be thus settled is no more than a bet on the price of grain during or at the end of a limited period. If one party is not to deliver or the other to receive the grain, it is in all but name a gambling on the price of the commodity, and the change of names never changes the quality or nature of things. There is no evidence that the appellees had contracted for the wheat necessary to fill the contract, or had incurred the least expense towards the performance.

"The statute has prohibited, under heavy penalties, the sale of wheat on called options, to buy or sell grain, because

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of its pernicious tendency; but it seems to me that these contracts for the sale of grain, where neither party intends to perform them, but simply to cancel them before or at their maturity, and pay differences, are injurious to trade, and fully as immoral as are the sales of options.

“It is claimed that this wheat was again sold to ascertain the difference that should be paid. What wheat? it may be asked. There is no evidence that the appellees had any wheat that could be delivered at the place of the contract. So far as we can see the wheat only existed in imagination, and even this imaginary wheat may have been already sold a number of times before the imaginary fulfillment of the contract.”

So, in the case at bar, there is no proof that the plaintiff or his agent, the factor, had in fact any rye to deliver, or any warehouse receipts representing rye in store. If this fact existed, it could easily have been proved, and would doubtless have been established by some competent evidence. There is no evidence that Wright & Co. had a pound of rye in store with which to fill their contract for the sale of fifteen thousand bushels to the plaintiff's factor. Wright & Co., as far as it appears, relied for the fulfillment of the contract upon receiving ten thousand bushels of rye from Gerstenberg, and five thousand bushels from other parties, who, as far as we know, had neither rye nor warehouse receipts to deliver. Why were not some of these parties called to show that they held rye or warehouse receipts ready for delivery in fulfillment of their contracts? The inference is that they had none, and that they all depended upon paying differences to adjust their contracts.

In my judgment it appears, by a decided preponderance of evidence, that it was not the intention of the parties to the contracts of July and August, 1880, that the rye should be delivered in fulfillment of said contracts, either by consignment or the transfer of warehouse receipts, but that said

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contracts should be adjusted and settled by the payment of differences. These contracts being, therefore, void, judgment must be given for the defendant.

NOTE.¹— The question of the legality of sales by option, which is discussed with so much ability by Judge Love in the foregoing case, is dependent in part on local legislation, in part on judicial precedent, in part on the special tendency of the adjudicating court in respect to political economy. In the latter respect two conflicting tendencies exist:

1. That of *laissez faire*, accepted in the main by Adam Smith and by J. S. Mill, and forming part of the political system of English liberals and of *doctrinaire* democrats in this country. Business should be left free, so it is argued, to adjust itself. For government to interfere in the making of contracts (unless for the single purpose of determining the proof on which they are to be sustained, as is the case with the statute of frauds) creates a greater evil than the evil it is intended to cure. This is eminently the case, so it is insisted, with “corners” and “options.” If all “corners” are prohibited, either by legislation or by judicial decision, all retail business will be prohibited. There is no purchase for retailing into which the motive of “cornering” does not enter. I buy for the purpose of profit, and there is a tacit understanding between myself and other retailers that there shall be a sufficient advance charged to enable us all to make something by the transaction. In other words, we buy up all of a particular commodity, and we say to the consumer, “You shall not get this except on paying a higher price than we paid for it.” Now this is “cornering” in so far as that by a tacit consent it precludes the consumer from obtaining the goods in question unless he pays a premium to the retailer; and the manufacturer or wholesale dealer unites in this “cornering” by refusing to sell to the consumer unless on retail prices. The principle is the same as when particular parties unite to “engross” or absorb a particular staple by buying up the whole of it in the market and then holding it for a rise. This, which is “cornering” in the popular sense, no doubt may be used for extortionate purposes, yet it cannot be prohibited without at the same time prohibiting all retail trade. The evil cures itself far more effectually than it can be cured by the interference of the law. Supposing that a monopoly is obtained by mere voluntary absorption of a particular article by which great gains are got, this leads only to the starting of competitors in the same line; and for the law to interfere and say “You shall not monopolize,” is equivalent to saying, “You shall not trade.” The same distinctions may be taken in respect to sales of

¹ From *Federal Reporter*.

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things not at the time owned by the vendor. It is said that for me to agree to deliver next week at a fixed price a thing I do not now own, is gambling. It may be so; but, if it be, then gambling infects so large a part of every-day life, that if all that gambling thus infects be prohibited, business will be prohibited. My baker and butcher, for instance, engage to supply me with provisions each day for a month in advance, though these provisions are not now in their hands; and though they usually engage to supply at the market price, yet the cases are not rare in which (*e. g.*, so much a pound for butter or so much for a loaf of bread) the prices are fixed in advance. All building contracts are based on this principle; the contractor makes or loses as the materials he uses fall or rise in the market, or the weather is unpropitious or propitious. If things are let alone, all this corrects itself. Men will make their contracts more special, so as to guard against disasters, or they will obtain insurances collaterally against loss; and, even if there are occasional disasters, it will be found that in the excitement of competition, and in the constant presence of risk, there is a stimulus, without which enterprise, caution and sagacity could not be effectually called forth. That when things are let alone — in other words, when “trade” is “free” — things ultimately adjust themselves far better than could be done if the government interfered, is illustrated by the every-day operations by which a great city is fed. Here are one hundred thousand families, and each family has brought to its door the supply of milk, of bread, of meat, on which it relies. You station yourself — I borrow in this one of Archbishop Whateley’s illustrations — on one of the avenues to a city as day is breaking, and you see approaching multitudinous wagons or boats laden with produce of all kinds. No law uttered by legislature or court prescribes to each producer or peddler what he shall bring to the city and what he shall sell; the only law is the social law of supply and demand; but this works so perfectly that the milk from a thousand dairies is collected to-night to be distributed early to-morrow morning precisely where it is needed in the city, and so with the vegetables from a thousand truck farms, and the meat from hundreds of slaughter-houses. If government, through either legislature or court, should interfere, this delicate adaptation of supply for demand would be destroyed. It is only by letting competition be unrestrained that supply is so adjusted to demand as to properly employ the producer and properly supply the consumer. It is only under the incitement of competition thus induced that the staples of trade are from day to day extended and machinery made more perfect. Such is the *laissez faire* theory of political economy — a theory of late years, since the triumph of free trade principles in England, adopted by the English courts as well as by the British parliament, and adopted also by the courts of several of our own states.

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2. The conflicting school, to which I called attention, starts from an ethical or police basis. "Certain business contracts," it says, "are immoral, and must be prohibited;" and among immoral contracts are classed all contracts for the sale of things the vendor does not possess at the time, and which he does not expect to possess; the contract in such case only binding him to pay the difference in price in case the price of the article sold has risen at the time fixed, he being entitled to benefit by any fall of prices marked at the same period. This position is thus stated by Judge Love in the opinion above given. "If it be not the *bona fide* intention of the parties that the property shall be in fact delivered in fulfillment of the contract of sale, but that the seller may, at his election, deliver or not deliver, and pay differences, then the contract is void." In Illinois this is prescribed by a statute quoted by Judge Love, and though that statute is in terms so broad as to cover contracts which are not in any sense gambling, it is restricted by the state judiciary to cases where the transaction is to be "adjusted only upon differences." As going to the same point may be cited *Lyon v. Culbertson*, 83 Ill. 33, and other Illinois cases cited by me in the opening article in the Criminal Law Magazine for January, 1850.

As the contract before us was an Illinois contract, it was governed by Illinois law; and (supposing that the Illinois statute was not repugnant to the federal constitution) Judge Love had no alternative but to apply it as construed by the Illinois courts. Whether such a statute conflicts with the clause in the federal constitution which provides that state laws impairing the validity of contracts shall be inoperative, is an important question which has not as yet been discussed; and it may be in view of this question that Judge Love, in the opinion before us, rests his conclusion, not merely on the statute, but upon the general policy of the law. And there is no question that, irrespective of statute, it is settled that a contract to pay any rise on the price of a particular article, at a given future period, is void under the common law as gambling. It is not a contract for sale and delivery, for no delivery is contemplated. It is simply a bet as to what the market will be at a particular time. "If prices are stationary, there will be nothing to pay. If prices rise, I pay you the rise. If they fall, you must pay me the fall." Such a contract the courts will not enforce, as against the policy of the law. *Porter v. Viets*, 1 Biss. 177; *In re Green*, 7 Biss. 338; *Clark v. Foss*, id. 540; *Rumsey v. Berry*, 65 Me. 570; *Noyes v. Spaulding*, 27 Vt. 420; *Sampson v. Shaw*, 101 Mass. 145; *Bigelow v. Benedict*, 70 N. Y. 202; *Story v. Salomon*, 71 N. Y. 420; *Harris v. Tumbridge*, 83 N. Y. 95; *Bruce's Appeal*, 55 Pa. St. 94; *Smith v. Bouvier*, 70 Pa. St. 325; *Moxten v. Gheen*, 75 Pa. St. 166; *Schwartz's Appeal*, 3 Brewst. 131; *Fareira v. Gatell*, 89 Pa. St. 89; *North v. Phillips*, 89 Pa. St. 25; *Gheen v. Johnson*, 90 Pa. St. 38; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Lyon v. Culbert-*

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son, 83 Ill. 38; *Gregory v. Wendell*, 39 Mich. 337; *Barnard v. Backhaus*, 52 Wis. 593; S. C. 9 N. W. Rep. 595; *Sawyer v. Taggart*, 14 Bush, 727; *Wilheim v. Carr*, 80 N. C. 294. See, also, opinion of Treat, D. J., in *Third Nat. Bank v. Harrison*, ante, p. 248, citing opinion of Thayer, J., in the *Tinsley Case*.

Upon the whole question before us the following points may be regarded as settled:

1. Where the vendor contemplates *bona fide* delivery, the contract is not vitiated by the fact that he does not have the goods on hand at the sale. *Hibblewhite v. McMorine*, 5 M. & W. 462; *Mortimer v. McMorine*, 6 M. & W. 58; *Hatch v. Douglas*, 43 Conn. —; *Stanton v. Small*, 3 Sandf. 230; *Morris v. Tumbridge*, 83 N. Y. 92; *Smith v. Bouvier*, 7 Pa. St. 325; *Brown v. Speyers*, 20 Gratt. 296; *Cole v. Milmine*, 83 Ill. 349.

Nor is the contract vitiated by the fact that there is to be only a symbolical delivery, the thing to be delivered being at the time of delivery within the power of the vendor, so that if he choose he can obtain it and deliver it. *Ashton v. Dakin*, 4 H. & N. 867; *Cameron v. Durkheim*, 55 N. J. 425; *Sawyer v. Taggart*, 14 Bush, 727. See Biddle, Stockbrokers, 303.

In Pennsylvania, recent cases may be interpreted as holding that the fact that the party selling does not expect to have the thing sold in hand infects the transaction with the taint of gambling. See *North v. Phillips*, 89 Pa. St. 250; *Ruchizky v. De Haven*, 97 Pa. St. 202; *Dickson v. Thomas*, id. 278.

But this, if such is the point actually ruled, is inconsistent with the rule established in England, and with that freedom as to contract which should be maintained unless as to contracts actually repugnant to settled policy. A party ought to be entitled to sell on expectancy.

2. The mere fact that an option is reserved does not vitiate. There are many circumstances under which an option is the only way in which can be consummated transactions beneficial to both sides. If all options were to be prohibited, all conditional contracts would have to be prohibited. See *Bigelow v. Benedict*, 70 N. Y. 202; *Kirkpatrick v. Bousell*, 53 N. Y. 318.

3. When no delivery, either actual or symbolical, is intended, but merely a settlement of differences, the contract is void, and neither party can sustain on it a suit. *Grizeword v. Blane*, 11 C. B. 528; *Ex parte Marnham*, 2 De G. F. & J. 634; *Porter v. Viets*, 1 Biss. 177; Biddle, Stockbrokers, 33, and cases cited above.

It may be added that on the topic of Stockbroking two valuable treatises have been published in the last few weeks, the first in order of time being by Messrs. Arthur & George Dibble, of Philadelphia (Lippincott & Co., 1882); and the second that of Mr. J. R. Dos Passos, of New York (Harper & Bro., 1882).

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To the first of these works several references have been already made. Mr. Dos Passos, on the topic before us, states the following conclusions:

“(1) Where a contract is made for the delivery or acceptance of securities at a future day at a price named, and neither party at the time of the making of the contract intends to deliver or accept the shares, but merely to pay differences according to the rise or fall of the market, the contract is void, either by virtue of statute or as contrary to public policy.

“(2) That in each transaction the law looks primarily at the intention of the parties, which intention is a matter of fact for the jury to determine.

“(3) That the form of the transaction is not conclusive, and oral evidence may be given of the surrounding circumstances and condition of the parties to show their intention, and that a contract purporting on its face to be a contract of sale is a mere gambling device, although the contract is in writing, under seal.

“(4) That option contracts — viz., ‘puts,’ ‘calls,’ and ‘straddles’ — are not *prima facie* gambling contracts.

“(5) To make a contract a gambling transaction both parties must concur in the illegal intent.

“(6) The defense of wager must be affirmatively pleaded, and the burden of proof is upon the party asserting the same.

“(7) In construing a contract, that construction is to be preferred which will support it, rather than one which will avoid it.

“(8) A maker who makes real contracts with third persons in behalf of his client, with the understanding between the client and maker that the former shall never be called upon to pay or receive more than differences, can recover the amount paid out for his client in the transactions, together with his commission.

“(9) A maker who advances money to his principal to pay losses incurred in a stock-wagering transaction can recover the same either on a note or otherwise.

“(10) A bill of exchange or promissory note given upon a stock-jobbing transaction is valid in the hands of a party who took it before it was due, for value, and without notice of the illegal consideration.

“(11) But such a bill is void in the hands of the original parties, or in the hands of a person who takes it after it is due or with notice of the facts.”

FRANCIS WHARTON.

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CHAMBERS v. HOLLAND.

(*Eastern District of Missouri. April, 1882.*)

1. REMOVAL OF CASES FROM STATE COURTS — SECTION 2 OF THE ACT OF MARCH 3, 1875, CONSTRUED.— A case cannot be removed from a state court to a circuit court of the United States, as to one defendant, and left pending in the state court as to another.

Motion to remand.

This suit was originally brought in the St. Louis circuit court against Clinton M. Swope and Joseph B. Holland. The latter seeks to remove the cause, so far as he is concerned, to this court. The plaintiff asks to have the cause remanded because the federal statutes do not authorize the removal of a part of a cause; and for other reasons. The other material facts are sufficiently stated in the opinions of the court.

Brodhead, Slaybeck & Haeussler, for plaintiff.

S. M. Smith, for defendant.

McCRARY, *Circuit Judge*.— It is understood that this is an attempt to remove a *part* of the case from the state court. One defendant seeks to remove the cause so far as he is concerned, leaving the case as against the other defendant to go on in the state court. This is attempted under the provisions of section 639 of the Revised Statutes of the United States, and the proceeding is sought to be upheld under that section upon the ground that there is a controversy between the defendant removing and the plaintiff (citizens of different states) which can be finally determined "without the presence of the other defendant," who is a citizen of this state. This is denied; but without considering the question whether it be so or not, let us inquire whether, as the law now stands, the case can under any circumstances be split, and one portion tried here and the other in the state court. This inquiry involves a decision of the question whether the second section of the act of March 3, 1875, repeals or modifies section 639

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of the Revised Statutes. That section, among other things, provides as follows:

“When the suit is against an alien and a citizen of the state wherein it is brought, or is by a citizen of such state against a citizen of the same and a citizen of another state, it may be removed, as against said alien or citizen of another state, upon the petition of such defendant filed at any time before the trial or final hearing of the cause, if, so far as it relates to him, it is brought for the purpose of reinstating or enjoining him, or is a suit in which there can be a final determination of the controversy, so far as concerns him, without the presence of the other defendants as parties in the cause.”

This statute undoubtedly authorized the removal of part of a cause, and if it remains in full force the present cause, so far as it concerns the defendant removing, is properly here; assuming, of course, that in so far as it concerns him it can be heard and determined without the presence of his co-defendants. But the later act of March 3, 1875, deals with the same subject, and the question is whether it does not supersede or modify the earlier statute; at least so far as to require the removal of the whole case, if any part of it is removed. Section 2 of that act provides for the removal of causes involving the sum or value of more than \$500, and “in which there shall be a controversy between citizens of different states,” and then proceeds as follows:

“And when, in any suit mentioned in this section, there shall be a controversy which *is wholly* between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove *said suit* to the circuit court of the United States for the proper district.”

We *italicise* the words “said suit,” in the above quotation, because we think they were intended to provide for the removal of the whole suit, and not a part of it. The provision manifestly applies to the same class of cases described

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in the act of 1866, and embodied in section 639, R. S., above quoted. It may well be supposed that the evils growing out of the practice of attempting to try different parts of the same suit in different forums led congress to so change the statute as to put an end to that practice. For some purposes the act of 1866 may remain in force, but in so far as it authorizes the severance of causes in the state court, and the transfer of a part to the federal court for trial, it is superseded by the act of 1875. Motion sustained.

TREAT, *District Judge, concurring*.— While I fully concur that the motion to remand must be sustained, it may be well to add a few suggestions in support thereof. Under the act of 1866 it had been held, with sharp dissents, that a cause pending in a state court could be split into parts, some of which parts could be heard by removal in the United States courts and the others proceeded with in the state courts. Hence this unseemly condition of a cause would prevail in many instances, viz.: That the federal court would try the cause as to one defendant and the state court try the same cause at the same time against the other defendants, to the great accumulation of costs and expenses, and the possible determination of the rights of the parties differently, so that one party would have his cause adjudicated in one way in the federal forum, and the other in a different way in the state forum.

Under such splitting process each court had full jurisdiction of the parties before it, and could proceed to final judgment. Thus it might be that two parties jointly sued and jointly liable would be left, through separate and final judgments, in entirely distinct positions, although their obligations or differences were the same. If judgment in the state court was for the remaining defendant there, why should he not have the benefit of the judgment in his favor irrespective of what had been determined against the other defendant in the federal forum, and *vice versa*? The anom-

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alies of such proceedings, which many courts held to be allowable, led to the change of the rule as indicated in the act of 1875. My views of the true construction of the act of 1866 were sharply expressed in a dissenting opinion of years ago; but the right to a split in cases under the act of 1866 having afterwards been upheld judicially, it became necessary to correct the mischief by statute.

The act of 1875 must be interpreted with reference to all its provisions and to the mischief to be corrected. By its terms the original jurisdiction of federal courts was enlarged far beyond what had previously existed; designed apparently to cover the full sweep of the federal constitution. The first section of that act, which pertains to jurisdiction on the ground of the citizenship of the parties merely, states what, in the light of federal decisions, had a final and definite meaning, viz., that all necessary parties, plaintiff or defendant, should be citizens of different states.

The long line of federal decisions on that subject need not be cited or reviewed, for they are familiar to all. The question of original jurisdiction having been thus established by the first section, the second proceeded to state what cases pending in the state court could be removed.

As the jurisdiction of the federal courts could not, even by an act of congress, be made to transcend constitutional limits, the act in question prescribed what should, within constitutional limitations, confer original jurisdiction, and what federal courts might obtain through removals. It is obvious that what congress could not confer as original jurisdiction it could not confer through removals. If all the parties must be citizens of different states except when merely formal, why let some of the parties respectively remove the cause as to them, when it could not be wholly determined without the presence of others? The language of the second section is, that where a case is pending in a state court in which there is "a controversy between citizens of different states," etc., "either *party* may remove," etc. What is

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meant by a "party?" Any one of many plaintiffs or defendants, having his co-plaintiffs or co-defendants in the state court still to pursue or be pursued there, as the case might require, irrespective of the legal fact that the case could not be decided in either court without all the plaintiffs or defendants? That no such absurdity was contemplated is clear from the language which follows in the same section, viz.: "And when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which may be fully determined as between them, then either one or more of the plaintiffs or defendants, actually interested in such controversy, may remove," etc.

The question presented under the language last quoted called for a judicial interpretation of the words "wholly between citizens of different states." Suppose some of the plaintiffs are citizens of the same state as the defendant and the other plaintiffs are not, or that some of the plaintiffs are non-resident and others resident, and some of the defendants are resident and others non-resident, can any one of said plaintiffs or defendants remove the case? Is not the old rule recognized, viz., that where all the plaintiffs and all the defendants are citizens of different states, then the case is one of which a federal court would have jurisdiction if originally brought therein, and, recognizing that rule when a like case is instituted in a state court, either one of the plaintiffs or defendants in such a case may remove the entire suit? If that be not the true construction of the act of 1875, the former anomalies, and even worse, would prevail.

The term "wholly" should apply to the relationship of the parties plaintiff and defendant. A citizen of this state suing, in conjunction with other and necessary plaintiffs, who are citizens of another state, citizens of this state should not at the mere instance of a co-plaintiff, nor should such citizen defendants, be forced in a foreign jurisdiction. Certainly the citizens of a state are to be considered in such matters as

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well as non-residents. The case now here is one for libel; once tried in the state court and removed subsequently. Whether the facts would enable the case to be removed, on the ground of time, is not now considered; for no point is made therein. One of the two alleged wrongdoers asks the case to be moved as to him, leaving his co-defendant, who is a citizen of the same state as plaintiff, to pursue the controversy between them in the state court, while the plaintiff is brought here to pursue the other wrongdoer in this forum. Thus the one case, split into two parts, is to proceed at the same time in two different forums. The plaintiff is entitled, if he prevails, to a judgment against both defendants, although he can have only one satisfaction. If the removal is permissible by one, can his case be "wholly" determined with that one only present, or can it be said that the controversy is "wholly between citizens of different states."

But the points involved have been fully discussed and settled by the United States supreme court in the cases of *Barney v. Latham*, 103 U. S. 205, and *Blake v. McKim*, id. 336; and hence these comments might have been spared, as they seek only to enforce the reasons and the rules therein expressed.

The motion to remand is sustained.

O'LAUGHLIN v. UNION CENTRAL LIFE INS. CO.

(*Eastern District of Missouri. March, 1882.*)

1. INSURANCE—LIMITATION OF TIME WITHIN WHICH SUIT MAY BE BROUGHT.—A condition in a life policy that no suit shall be brought upon it unless brought within one year after the assured's death, is valid.
2. SAME.—A suit cannot be maintained upon a policy containing such a condition unless instituted within the time specified.
3. SAME—PLEADING.—Where suit is not instituted within the time specified, the condition need not be specially pleaded as a defense. It

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is sufficient to deny that the conditions of the policy have been complied with.

4. **SAME — INFANCY.**— The fact that the beneficiaries named in the policy are minors will not prevent the enforcement of such a condition. *Riddlesbarger v. Hartford Ins. Co.* 7 Wall. 386.

This is a suit by the guardian of Eugene and Mary Anne Byrnes, minors, on a policy of insurance upon the life of their mother, for their benefit.

The petition states that the mother died on the tenth of January, 1875, and alleges a full compliance with the conditions of the policy by the assured of the plaintiff. The answer denies that the assured and plaintiff fully complied with the conditions and requirements of the policy sued on, and alleges that the policy is void because of certain misrepresentations made by the assured to the defendant's agent when she applied for insurance on her life.

The case was tried before a jury.

The plaintiff introduced the policy sued on, in evidence. It contained the following condition, upon which it was issued, and accepted by the assured, viz.:

"No suit shall be brought upon this policy unless brought within one year after the death of the person whose life is insured."

The defendant admitted the death of the assured, and a compliance by her and the plaintiff with the conditions of the policy except as to bringing suit within a year after the assured's death. It is also admitted that a suit had been brought within the time specified in the policy, and that a nonsuit had been taken therein, and the present suit instituted shortly afterwards, but after the expiration of the year; and that the beneficiaries named in the policy are minors.

The defendant thereupon introduced evidence tending to show that it was induced to issue the policy by a misrepresentation.

The plaintiff introduced evidence in rebuttal.

The evidence being all in, the defendant asked the court

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to instruct the jury that under the evidence the plaintiff could not recover. The instruction being refused, other instructions were asked.

The court took time to consider the matter, and on the next day delivered the following opinion, and charged the jury as appears below.

The points made by the defendant sufficiently appear in the opinion of the court.

Donovan & Conroy, for plaintiff.

Harris & Joy, for defendant.

McCRAEY, *Circuit Judge (orally)*.—As I intimated yesterday, this is a question to which, on first impression, I should be inclined to apply the rule which it seems one of the courts of Cincinnati adopted, and that is that the bringing of a suit upon a policy within the year, and, if there be a nonsuit, a renewal of the action without delay, is a compliance with the condition; and if I were to rule according to my first impression, that would be the decision of the question. But the supreme court of the United States in *Riddlesbarger v. Ins. Co.* 7 Wall. 386, has distinctly decided two propositions: *First*, that this condition is a valid one—one which the parties have a right to make and one which the courts must enforce; and *secondly*, that it requires the particular suit which is being tried, and in which a party seeks to obtain judgment, to have been brought within one year from the time of death. And that was a case like this, where the party had commenced a suit, and, for some reason or other satisfactory to himself, had suffered a nonsuit and had renewed the suit. The court held that because the new suit was not brought within one year from the date of the death, it was too late. We are bound, of course, by that decision, and that is the law which must be administered here. That leaves nothing to be considered except the other questions

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which have been suggested, and we are not able to see that there is anything in them that ought to require the court to refuse the instruction which has been asked. It is said that this defense is not specially pleaded, and cases are cited wherein it is said that the statutory defense of limitation must be specially pleaded. No doubt that is so; but this is not a plea of the statute of limitations, but a question whether the plaintiff has complied with the contract upon which the suit is brought. That is a written contract, and contains certain conditions and provisions, and the plaintiff has alleged that they were complied with. The defendant has denied it. That makes the issue upon every one of the provisions. It is necessary that the plaintiff should show by a preponderance of testimony that the conditions have been complied with. So that we are unable to say, because there is not a special defense that this particular provision was not complied with, that therefore the defendant cannot avail itself of that defense.

It is said that, because the beneficiaries here are minors, therefore the condition cannot be enforced. I have been unable to find authority in support of that proposition, and counsel have not cited any. A guardian can bring the suit, and is bound to bring it under the contract and according to the contract. It is not a suit that cannot be brought. It is not a suit that the parties, by reason of their disability, cannot bring; but it is a suit which the guardian can bring, and is bound to bring, I think, in accordance with the terms of the contract. If I could see my way clear to rule otherwise, I confess I should be glad to do it, because I have not much sympathy with this sort of defense in a suit of this kind; but the law being as it is, I think the instruction will have to be given.

Judge McCrary then charged the jury as follows:

"The jury are instructed that one of the conditions of the policy here sued on is that no suit shall be brought on this policy unless brought within one year after the death of the

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person whose life is insured, and it devolves on the plaintiff to show that the suit was brought within one year after the time when Mary Kate Byrnes died, and unless they have so shown then they cannot recover in this action."

Whereupon the plaintiff took a nonsuit.

KIUFKE v. MERCHANTS' DISPATCH TRANSP. CO.

(*Eastern District of Missouri. April, 1882.*)

1. PRACTICE — SERVICE OF SUMMONS — RETURN — R. S. Mo. § 3489.—

Where a foreign corporation is served with summons under a statute providing that service in such cases may be by delivering a copy of the writ and petition to any officer or agent of such company "in charge of any office or place of business" that it may have, the return of service should state that a copy of the writ and the petition were delivered to an officer or agent *in charge of an office or place of business* of the defendant.

The defendant in this case is a corporation organized under the laws of the state of New York. The return of service of summons indorsed upon the writ by the marshal is as follows:

"*United States of America, Eastern District of Missouri — act.*

"I return on this writ that I have served the same on the within named, the Merchants' Dispatch Transportation Company, a corporation, by delivering a copy of this writ, together with a copy of the petition thereto attached, to J. M. Stuve, the agent of the aforesaid company (the president and vice-president being non-residents of this district and could not be found), at said company's office in St. Louis, in the above district, on March 4, 1882.

"F. COSTE, United States Marshal," etc.

The other material facts are sufficiently stated in the opinion of the court.

G. M. Stewart and Paul Bakewell, for plaintiff.

S. M. Breckenridge, for defendant.

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TREAT, *District Judge*.— The defendant has filed a motion to quash the marshal's return of service, supported by an affidavit. The parties have treated said motion as if it were a plea of abatement, to which the plaintiff interposes a demurrer.

1. Was the service made in conformity with section 3489 of the Revised Statutes of Missouri? The return fails to state that the alleged agent of the defendant, a foreign or non-resident corporation, was an agent *in charge of an office or place of business of defendant*. The statute prescribes that where the defendant is a corporation organized under the laws of any other state or country, "and having an office or doing business in this state," the service may be made "by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business" of the defendant. The return being defective in that respect, the motion to quash is well taken.

2. The more important question was intended to be raised, to wit: If the return was not defective, but *false*, could the defendant impeach the return by plea in abatement submitting the facts *dehors* the record to a trial of the issue thus raised? The doctrine that a return cannot be so impeached in a domestic judgment, although it may be in a foreign judgment, has received the sanction of many courts, and of none in more decided terms than by the supreme court of Missouri. This court does not pass upon the question in this case; for on the ruling as to the first point the service is defective, and therefore a decision on the second is not necessary. It may be that the weight of authority as to the latter question is largely with the demurrant; yet the reason for such a ruling may not, on full review and mature deliberation, be held either satisfactory or conclusive. But nothing is now decided in that regard.

After proper service, if such a plea is interposed, the court will pass upon it; hence the only entry now will be that the motion to quash is sustained, with leave to amend.

Zeperink and others v. Card and another.

ZEPERINK and others v. CARD and another.

(Eastern District of Missouri. March, 1882.)

1. **BANKRUPTCY — PRINCIPAL AND AGENT**—R. S. § 5017.—Where a commission merchant, as agent of the owner, sells goods and fails, without fraud, but because of insolvency, to account for the proceeds of the sale, and subsequently becomes a bankrupt and receives his discharge in bankruptcy, the proceedings in bankruptcy will discharge his debt to his principal.

Suit in an account against factors.

The answer sets up a discharge in bankruptcy, and alleges, among other things, that the plaintiffs proved up their claims in bankruptcy, received dividends, and did not object to defendants receiving their discharge. It also denies fraud. Demurrer to answer. The other material facts are sufficiently stated in the opinion of the court.

W. B. Homer and R. M. Nichols, for plaintiffs.

Noble & Orrick, for defendants.

McCRARY, *Circuit Judge (orally)*.—This is a suit upon an account. The defendants set up as their defense a discharge in bankruptcy. The plaintiffs demur to this answer, and the question is whether the discharge is good as against the indebtedness which is the foundation of the suit. The answer admits that said indebtedness was contracted in the course of defendants' dealings with the plaintiffs, while they (defendants) were acting as plaintiffs' factors in the capacity of commission merchants. It does not appear from the answer that the debt grew out of a single transaction, but it does appear that it is a balance due for the proceeds of sales of iron which was sent to the defendants as commission merchants, to be sold and accounted for by them to the plaintiffs. The question is whether the debt thus contracted was, within the meaning of section 5017 of the Revised Statutes, a debt contracted by the defendants "while acting in

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a fiduciary capacity." That section is as follows: "No debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary capacity, shall be discharged by proceedings in bankruptcy, but the debt may be proven and the dividends thereon shall be a payment on account of the debt."

Upon the question whether a debt contracted by a commission merchant, by his failure to account for the proceeds of goods sold by him as such, is within this section, there is a great conflict in the authorities. The affirmative is maintained by the following, among other cases, viz.: *In re Seymour*, 1 Blatchf. 352; *In re Kimbal*, 2 Ben. 554; S. C. on appeal, 6 Blatchf. 292; *Treadwell v. Holloway*, 46 Cal. 547; *Meador v. Sharpe*, 54 Ga. 125; *Jones v. Russell*, 44 Ga. 460; *Whitaker v. Chapman*, 3 Lans. 155; *Lemcke v. Booth*, 47 Mo. 385; *Banning v. Bleakley*, 27 La. Ann. 257; *Brown v. Garrard*, 28 La. Ann. 870.

The negative of the proposition has been maintained in the following, among other cases, viz.: *Cronan v. Colting*, 104 Mass. 248; *Grover & Baker S. M. Co. v. Clinton*, 8 N. B. R. 312; S. C. 5 Biss. 512; *Kime v. Graff*, 17 N. B. R. 319; *Owsley v. Cobin*, 15 N. B. R. 489.

It would serve no useful purpose for me to enter into an elaborate discussion of this question, as little could be said on either side of it which is not to be found in the cases already referred to. The amount involved is large enough to enable the parties to take the case to the supreme court of the United States, and there have the question, which is important and doubtful, finally settled. It is sufficient for the present to say that in my judgment the better reason and also the greater weight of authority supports the position of the defendants, and we therefore hold that the discharge pleaded is a bar to the action, and overrule the demurrer to the answer.

Counsel for defendants can take an exception.

Schoolfield, Hanauer & Co. v. Johnson & Sullivan and another.

SCHOOLFIELD, HANAUER & Co. v. JOHNSON & SULLIVAN and another.

(*Eastern District of Arkansas. October, 1881.*)

1. ASSIGNMENT IN TRUST FOR BENEFIT OF CREDITORS, WHEN VOID.—

A deed of assignment for the benefit of creditors, which in terms directs or authorizes the assignee to execute the trust and dispose of the property in a mode not authorized by the statute, or contrary to its requirements, is void.

CALDWELL, *District Judge*.—The validity of the deeds of assignment on their face is the only question in this case. The particular clauses of the deeds of assignment which it is claimed avoid the instruments are the following: The trustee is directed to “proceed at once to execute this trust by converting all property herein conveyed into money with as much rapidity as possible consistent with the interest of our creditors;” . . . “and is hereby empowered to sell all goods or property of every kind herein conveyed at *public* or *private sale*, for *cash* or *otherwise*, as may seem best to the interest of our creditors, with or without public or private notice of any kind.” These provisions are in both deeds. One of the deeds conveys the leasehold interest of the assignors in three plantations, and directs “that said trustee shall take immediate possession of them, and take all steps necessary and as may seem best to him for the purpose of *cultivating them*; may purchase mules, implements, supplies, and all things necessary to the interests of our creditors.”

The two deeds were executed on the same day and for the same purpose, each deed conveying different portions of the assignor's property, and are to be taken together as one instrument. Burr: Assignm. § 128.

If valid, the assignee might purchase mules, etc., to carry on the plantations mentioned in one deed, with means derived from sale of property conveyed by the other. The authority conferred on the trustee to sell the property at public or private sale, and for cash or otherwise, and with or

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without notice of any kind, is in conflict with the statute of this state and renders the assignment void.

Section 387, Gantt's Digest, in terms provides that the "assignee shall be required to sell all the property assigned, at public auction, within one hundred and twenty days, and shall give at least thirty days' notice of the time and place of such sale."

The court has uniformly held that an assignment, which in terms directed or authorized the assignee to execute the trust and dispose of the property in a mode not authorized by the statute, or contrary to its requirements, avoided the assignment.

In *Schwab v. Hollowell* (April term, 1879), the language of the deed was, "to sell at public or private sale, at wholesale or retail, for cash or on a credit;" and the court (Judge Dillon presiding) held the deed void because it authorized a private sale of the property in contravention of the statute. The same ruling was made in *Bartlett v. Teah*, 1 Fed. Rep. 768, and in many other cases. The former circuit judge concurred in these rulings, and they are undoubtedly supported by the current of authorities on the question. *Rapalee v. Stewart*, 27 N. Y. 310; *Woodburn v. Mosher*, 9 Barb. 255; *Keep v. Sanderson*, 12 Wis. 391; *McCleery v. Allen*, 7 Neb. 21; *Sumner v. Hicks*, 2 Black, 532.

U. M. Rose and B. C. Brown, for plaintiffs.

Dodge & Johnson, for interpleader.

Walkenhauer v. The Chicago, Burlington & Quincy R. Co.

WALKENHAUER v. THE CHICAGO, BURLINGTON & QUINCY R. CO.

(*District of Iowa. February, 1882.*)

1. RAILWAY COMPANY — DUTY TO FENCE — IOWA STATUTE CONSTRUED — INJURY TO INFANT CHILD WHILE ON THE TRACK.—Section 1289 of the code of Iowa of 1878, which provides that if a railway company fails to fence its road against live stock running at large, it shall be liable to the owner of any such stock killed or injured by its trains by reason of the want of such fence, unless the same was occasioned by the willful act of the owner or his agent, does not make it the duty of the company to fence its road, nor subject it to liability for injury to an infant child while on the track.

The petition alleges that the defendant was guilty of negligence in having its fence out of repair that encloses the railway track at a point in Des Moines county, Iowa, where said track runs through plaintiff's farm. That defendant is required by law to keep a fence at that point, and that by reason of the negligence of defendant in this regard the infant child of plaintiff went upon the railway track and was killed by a passing engine. No negligence on the part of defendant other than the failure to fence the road at the place of the accident is alleged.

Defendant demurs to the petition on the ground that the law requires no fencing for the purpose of keeping men, women and children off the track, and because the facts stated do not show a cause of action.

T. C. Whiteley and Newman & Blake, for plaintiff.

P. Henry Smyth and H. H. Trimble, for defendant.

McCRARY, *Circuit Judge*.—Where the statute imposes upon a railway company the duty to fence its track, it may well be claimed that the neglect of that duty is negligence, for all the consequences of which the company would be liable; and such being the rule, it might be contended, with much force of argument, that the company would be liable for an injury to an infant child caused by the absence of such fence,

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notwithstanding the fact that the purpose of the statute may have been to prevent injury to live stock. It is not, however, necessary in the present case to consider these questions, for we are of the opinion that the Iowa statute did not impose upon the defendant the duty of fencing its track. The statute provides as follows:

“Any corporation operating a railway that fails to fence the same against live stock running at large at all points where such right to fence exists shall be liable to the owner of any such stock injured or killed by reason of the want of such fence or for the value of the property or damage caused, unless the same was occasioned by the willful act of the owner or his agent. And in order to recover, it shall only be necessary for the owner to prove the injury or destruction of his property; and if such corporation neglect to pay the value of, or damage done to, any such stock, within thirty days after notice in writing, accompanied by an affidavit of such injury or destruction, has been served, . . . such owner shall be entitled to recover double the value of the stock killed or damages caused thereby,” etc. Code of 1873, sec. 1289.

This statute does not provide that every railway company shall fence its track. It imposes no positive or imperative duty to do so. It is a statute plainly intended to protect the owner of live stock running at large, and this purpose is sought to be accomplished, not by imposing the duty of fencing upon the railway companies, but by providing that if they shall fail to fence they shall be liable to the owner of any stock killed or injured for the want of a fence, unless occasioned by the willful act of the owner, and that in case such owner is not paid the amount of his damages within thirty days from the time he shall give notice of his loss to the company, and prove the amount thereof by affidavit, he may recover double damages. Under the statute the railway company is not bound to fence its road, but is subject to a certain liability if it fail to do so. If the company

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chooses to run the risk of leaving its road unfenced, and to assume the pecuniary liability imposed by the statute as a consequence of so doing, it has a right to do so. It cannot, therefore, be said that the statute imposed upon the company the absolute duty of fencing, and as negligence can only be imputed to the company in consequence of a failure to discharge a duty imposed by law, the defendant cannot be held liable upon the facts stated in the petition.

The demurrer to the petition is accordingly sustained.

I am authorized to say that Love, district judge, concurs in this opinion.

PATRICK v. LEACH *et al.*

(*District of Nebraska. May, 1881.*)

1. **ATTORNEY — LIEN UPON JUDGMENT FOR FEES — LACHES.**— An attorney who conducts a suit for his client and obtains a judgment therein, upon which he is entitled to a lien for fees, is not bound to make himself a party to the record in order to enforce his lien; and if he has perfected his lien according to law and given notice as required, he may enforce it notwithstanding a compromise and settlement between his client and the adverse party.
2. **SAME — RIGHT OF ATTORNEY TO BE MADE A PARTY.**— If it appears to the court after judgment, and in a suit brought to set the same aside, that it may be necessary for the protection of the rights of the attorney that he be made a party to the suit, an order allowing him to intervene will be made.

On application of J. C. Cowin and Howe to be made parties defendant for the purpose of protecting their lien for fees upon the judgment to set aside which the suit is brought. The facts are stated in the opinion.

McCABY, Circuit Judge.—These petitioners are the attorneys for the respondent Leach, and were his attorneys in the state court in which the judgment was rendered against complainant which is sought to be enjoined. They claim a

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lien upon that judgment for attorneys' fees. They filed their lien in the state court, but whether they gave the notice required by law is a matter of dispute, petitioners asserting that they did, and Patrick that they did not.

The petitioners say that they relied upon their lien and did not anticipate that their client would undertake to settle and satisfy the judgment without their consent; and that, therefore, they did not deem it necessary for the protection of their rights to make themselves parties. Their client, Leach, did, however, prior to the announcement of a decision by the court in this case, enter into an agreement of compromise and settlement with Patrick, whereby the judgment was to be satisfied and cancelled. The case was subsequently decided by this court upon the merits and without reference to the settlement in favor of Patrick, and a decree was prepared enjoining the collection of said judgment.

On the twenty-ninth of April last the petitioners presented the present application. The decree in this case had been previously prepared and approved by the judge; but in view of the filing of this application, the decree, though signed on the first of April, was not filed, but held by the judge until a hearing upon this application could be had. The case is, therefore, not yet finally disposed of, and it is within the power of the court to modify or cancel altogether the decree which has been signed, but not filed or recorded. The court has not, up to the present moment, lost control of the case. The record has not been finally made up. The application may, therefore, be considered upon its merits. We conclude:

1. That petitioners were not guilty of laches in not making this application sooner. They were not bound to anticipate a settlement and cancellation of the judgment. They had a right to presume that their rights would be regarded by their client, and that it would not be necessary for them as against him to be made parties to this suit, in order to preserve any right they had by virtue of their claim of lien upon the judgment.

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2. That under the peculiar circumstances, injustice may be done the petitioners if they are not made parties. If, for example, an appeal from the decree of this court shall be prosecuted in the name of the defendant Leach alone, it would probably be dismissed by the supreme court on the ground of the settlement. To this he could not object; but the petitioners, if parties, could, upon the ground that they are not bound by the settlement. If parties, the petitioners could appear and have a hearing in the supreme court upon the merits; and if, upon the merits, the decree of this court should be reversed, they would be entitled to the enforcement of their lien, if it shall prove to be valid, notwithstanding the settlement may be held binding upon Leach. On the other hand, if the present application be denied, and Leach's appeal should be dismissed on the ground of the settlement, the result would be that the petitioners would be concluded upon the question of their lien, and at the same time deprived of the benefit of an appeal. In other words, the decree of this court would be rendered, as to them, final.

3. As to the question whether Patrick had notice of the lien of petitioners, upon the present showing there is a conflict of testimony. The petitioners charge notice; Patrick denies it. There is an issue of fact and a fair question to be litigated. We do not decide it either way at present, but hold that if the decree of this court upon the merits should be reversed, they ought upon a rehearing to be heard upon it.

4. As this court holds the judgment ought to be cancelled and satisfied, it follows that we must also hold that the petitioners have no right under their claim of lien, but before rendering final decree we will make them parties in order to give them the benefit of an appeal. There need be no delay.

Let the petitioners be made defendants and file their bill of intervention at the present term, within a time certain to be fixed. They can only be heard upon the record as it stands. They cannot because of the misconduct of their

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client be permitted to reopen the case for taking further testimony. Final decree will therefore be entered at this term, and an appeal allowed.

J. M. Woolworth, for plaintiff.

Cowin and Howe, *pro se*.

SCHOOL DISTRICT NO. 13, SHERMAN COUNTY, v. LOVEJOY.

(*District of Nebraska. May, 1882.*)

1. JUDGMENT BY DEFAULT — BILL TO OPEN — DILIGENCE IN DEFENDING — WRITING TO AN ATTORNEY NOT ENOUGH. — A party sued and regularly served with summons must use due diligence to make his defense; and it is not enough for him to show, in order to set aside a judgment against him by default after the term, that he wrote to a lawyer to defend the case, but paid no fee, and received no answer to his letter.

Bill in equity to set aside a judgment at law rendered by default at the November term, 1881. The bill admits that complainant was duly served with summons in the action in which the judgment was rendered against it, but avers that being situated some two hundred miles from the place where the court was to sit, it caused its local counsel to write and post a letter to Hon. T. M. Marquett, of Lincoln, requesting him to defend the case, which letter as complainant afterwards learned was lost in the mails by unavoidable accident and casualty and never reached Mr. Marquett. Complainant did not learn this fact until after the judgment was rendered and after the court had adjourned without day. The bill avers that complainant had a good defense to the suit at law. Respondent demurs to the bill.

Groff & Montgomery, for complainant.

Pritchett, for respondent.

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McCRARY, *Circuit Judge*.—It may be conceded that the letter to Marquett was mailed as alleged, and that it was lost in the mail by accident, and still there is no sufficient showing of diligence in the defense of the action at law. Litigants are, for reasons of great public importance, required to exercise due diligence in prosecuting or defending suits in which they are parties. Courts cannot make rules to aid or relieve those who are guilty of negligence. If Marquett had received the letter, he would have been under no legal obligation to defend the action. Moreover, it does not appear that he was furnished with the facts constituting the defense, nor with the names of witnesses relied upon to prove them, nor that any fee was paid or tendered him. Under such circumstances, and having received no answer to its communication, the complainant had no right to rely upon Mr. Marquett to make its defense, and was bound to appear and look after the case. This ruling is abundantly supported by the authorities. See Freeman on Judgments, secs. 502, 503, and cases cited.

Demurrer sustained.

WHITE, Adm'r, v. COLORADO CENTRAL RAILROAD COMPANY.

(*District of Colorado. July, 1878.*)

1. RAILROAD COMPANY—WAREHOUSEMAN—BAILEE FOR HIRE.—A railroad company which keeps a warehouse for storing goods carried over its line until they shall be called for by the consignee, in respect to goods so carried and stored in its warehouse, is regarded as a bailee for hire, and is required to exercise the care and diligence of ordinary warehousemen in keeping such goods.
2. NEGLIGENCE BY WAREHOUSEMAN—KEEPING POWDER IN WAREHOUSE.—Putting a large quantity of powder in the same warehouse with plaintiff's goods was negligent conduct for which defendant is liable in damages to the extent of the loss resulting to plaintiff from the presence of such powder in the warehouse.
3. SAME.—A fire occurring in defendant's warehouse where plaintiff's

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goods were stored, there being a large quantity of powder in the same, if the firemen who resorted to the place for the purpose of extinguishing the fire were, by the presence of the powder in the house, hindered and prevented from saving plaintiff's goods, the powder may be regarded as the proximate cause of the loss.

4. **SAME — STORING POWDER IN WAREHOUSE — JURY.**— In such a case the question of negligence is not for the jury, and the court may declare that the storing of powder in the same house with plaintiff's goods, such house being located in the city where there was danger from fire, was negligent conduct on the part of the defendant.

HALLETT, District Judge.— On the first of January last plaintiff's intestate shipped a lot of dry goods and clothing from Georgetown to Denver over defendant's line. The goods were received at Denver and placed in defendant's warehouse on the morning of the third of the same month. Two days later they were destroyed by fire, which originated in the building without fault of defendant. This action, in which plaintiff seeks to recover the value of the goods so destroyed, is founded upon an alleged liability of defendant to plaintiff as a common carrier and as a warehouseman.

As to the first count in the declaration, in which plaintiff sought to charge defendant as a common carrier, the jury have found against the plaintiff, and thus all questions arising on that count have been eliminated from the case. On the second count, in which defendant is charged with negligence as a warehouseman, the jury found for plaintiff in the sum of \$4,704.75, and the motion now to be considered is directed against that verdict.

It seems from the evidence that defendant's warehouse was a long wooden structure — one hundred feet or more in length — and that the company's offices for transacting its freight business were kept in one end of it. These offices were divided off from the main building by partitions, and the remainder of the building was used for storing goods. At about the center of the building on each side, and communicating with the part which was used for storage, were large doors, through which the goods were passed when re-

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ceived into or taken out of the building. The plaintiff's goods when received were put in that end of the building which did not contain the office, and, of course, at some distance from the doors last mentioned.

By the same train which brought plaintiff's goods a quantity of gunpowder, amounting to about one hundred and sixty kegs, was also received, and this powder was put by defendant in the same room with plaintiff's goods, but upon the other side of the doors before mentioned, and towards the offices, which were in that end of the building. So that, with reference to the doors which opened through the warehouse, it may be correct to say that the offices and the powder were in one end of building, while the plaintiff's goods were in the other end of the same building. But the powder was, in fact, pretty near the door on that side where it lay, and between the offices and the plaintiff's goods.

The fire which destroyed the building and the goods, when first discovered, was in the roof immediately above the offices, and, of course, at some distance from the plaintiff's goods.

Thus it appears that the fire was in one end of the building and the plaintiff's goods in the other, while the powder was between the fire and the goods, on the same side of the large doors before mentioned as the fire. This was the situation when members of the fire department arrived in considerable force on the ground with their apparatus for the purpose of extinguishing the fire. The weather was cold, and some delay occurred before water was obtained, but three or four streams were soon brought to bear, so that under ordinary circumstances the flames might have been suppressed before half the building was destroyed. One witness testifies that there was an opportunity to cut off the fire at the large doors before mentioned by carrying the water in at that place and playing on the fire from the inside.

But nothing of this kind was attempted, and, indeed, the firemen would not go within seventy or eighty feet of the

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building on the outside because they feared injury from the powder. Some testimony was given at the trial to show that this fear was unfounded, but if the experts who testified on that point had been present at the fire to explain the properties of gunpowder to the terrified firemen, it is doubtful whether the explanation would have been entirely satisfactory. The theory advanced is that metallic cans, in which the powder was put, are so expanded and cracked by the heat of a burning building, that the powder escapes, and in that condition, if ignited, it produces only a flash in the pan which is not at all dangerous to those who are outside of the building. If, however, one who is inside the building swallows the fire, as one of the witnesses said, it is deadly, so that even on this theory it was not safe to go into the building at the large doors before mentioned, for the purpose of suppressing the fire. So, too, a prudent person might well be excused from assuming that all of the cans would be cracked and laid open by the heat so as to render them harmless. Altogether it may be said that this evidence does not prove nor tend to prove that the powder was not dangerous to life in the situation where it was found, but merely that the workmen might have approached the building more closely without danger to themselves. Whether they could have worked more effectively at a distance from the building of twenty-five or thirty feet than at a distance of eighty feet, does not appear, but may be a matter of reasonable inference. It does, however, appear that the gunpowder prevented the firemen from going in at the large doors before mentioned, with hose, and there operating against the fire. All the witnesses agree that this movement would, under the circumstances, have been full of danger, and it seems probable that it was not made for that reason. One witness testifies that he suggested it to the firemen, and was answered that it was dangerous to go there on account of the powder. Looking to the form of the building, the fact that it was built of wood, and the situation of plaintiff's goods, with reference

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to the fire, it also seems probable that the goods would have been saved if the powder had not been stored in the building. Upon the evidence then showing, or tending to show, that the loss of the goods was due to the presence of powder in the warehouse, the court charged the jury as follows:

“As to the second cause of action, the liability of defendant, if any exists, depends upon the effect of storing powder in the warehouse, if any was stored there. You are advised that storing a considerable quantity of powder in the same house with plaintiff's goods was negligent conduct, and if the loss was occasioned by the presence of powder in the house, the defendant is liable. In order to fix such liability, however, it must appear to you from the evidence that the loss was certainly occasioned or produced by that cause. If those who were engaged in suppressing the fire would have been able to save plaintiff's goods, and would have done so if no powder had been kept in the building, the defendant may be held. But if this is a doubtful matter, and it is uncertain whether the presence of powder in the house occasioned the loss, the defendant is not liable. Upon that point you remember what the witnesses said about it, and you will determine as well as you can whether this loss certainly proceeded from that cause—from the presence of the powder. If it is doubtful in your minds upon the evidence here whether the loss was occasioned by that, that is to say, if withdrawing the powder from the house you think it still doubtful whether the goods would have been saved, the defendant cannot be held liable upon that. The only act of negligence, as it seems to me from the evidence here, was the putting of the powder there, and you must be able to ascribe the loss to that cause, and certainly to that, if you are to hold the defendant upon that. That is the position in which the matter stands.”

That this principle is applicable to ordinary warehousemen would appear to be beyond question. To store or deposit

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gunpowder in large quantities in any place in a city where it will endanger life and property, is a public nuisance. *Cheatham v. Shearon*, 1 Swan, 213; *Myers v. Malcolm*, 6 Hill, 292; *Hay v. Cohoes Co.* 2 N. Y. 159.

The case in 6 Hill shows that the party storing the powder will be liable for any damages that may result from it. And the same view is expressed in some of the text-books. 1 Addison on Torts, 308; Wood on Nuisances, § 142.

Warehouses are usually, if not always, located in cities where the danger from fire is great, and of course keepers of such houses must provide against the danger with reasonable care. It is often difficult to determine whether such care has been used, but no embarrassment is felt respecting the point now under consideration. With reference to warehousemen in general, we have only to ask whether a prudent man would store a large quantity of gunpowder in a building with other goods in a populous city; whether that is the usual and ordinary course of business, to decide the question of negligence.

But it is said that a railway company which keeps a warehouse for the convenience of the public and as a necessary appendage to the business of a carrier, is not to be put upon the footing of ordinary warehousemen; that the company is not a warehouseman by choice, but through the negligence of its patrons, who will not take away their goods as soon as they are received at the company's depot; that as the company may lawfully carry all things, so may it lawfully store whatever it carries, and he who entrusts goods to its charge takes upon himself the risk of such storage. These suggestions are not without weight, but it is believed that they ought not to prevail against the general rule which exacts from a bailee for hire reasonable diligence in the care of property entrusted to him. That a railway company, keeping the property of its patrons in its own warehouse for a reasonable time, until it shall be called for, is to be regarded as a bailee

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for hire and not as a naked depository, is now fully settled. *Norway Plains Company v. Boston & Maine Railroad*. 1 Gray, 273; Wharton on Negligence, § 478.

As such, no reason is seen for relieving it from the duties and responsibilities which attach to that character of bailment. It must be borne in mind that the company was not bound to carry the powder on its railway, and still less was it required to store so dangerous an article in its warehouse. *Boston & Albany Railroad Company v. Shanly*, 107 Mass. 575; Wharton on Negligence, § 856.

If the company was willing to incur the risk of carrying powder, it must be assumed that it was also willing to take upon itself the liabilities incident to such risk. So, also, it may be said the matter of storing the powder was disconnected from and entirely independent of the carrying. Although the company had carried the powder, it was not bound to put it in its warehouse. The consignee might have been required to take away the powder in the very hour of its arrival at Denver, or it might have been sent to some warehouse prepared and kept for storing such articles. Putting it in the warehouse of the company was a voluntary act, carrying danger to the property of others, and therefore wrongful in itself. That it was not an exercise of reasonable care in preserving the plaintiff's property which the law enjoined, seems to be too plain for argument.

Another objection to the charge is that the powder, if at all instrumental in the destruction of plaintiff's goods, was not the proximate cause of that result. To support this objection insurance cases are cited in which it has been held that loss occasioned by explosion of powder may be connected with the fire which ignited the powder as the proximate cause.

Hence it is claimed that in all such cases the fire and not the powder is the proximate cause of loss. But there may be, and usually there is, more than one agency or means of producing loss. Take, for instance, the car loaded with oil

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which escapes from the company's servant and ran down a steep grade and came in collision with a locomotive, which set fire to the oil, and thence it was communicated to the plaintiff's house. The fire and oil united in the destruction of plaintiff's house, and the cause of all the mischief was a defective brake on the car.

If there was negligence in respect to any one of these things, the person chargeable with such negligence was responsible for the loss. *Oil Creek & Alleghany Railway Company v. Keighson*, 74 Pa. 316.

So, also, where dry grass was negligently allowed to remain in heaps near defendant's railway, and fire was communicated to such heaps by a passing engine, and thence carried by the wind a distance of two hundred yards to plaintiff's cottage, which was destroyed, the defendant was held liable. *Smith v. London & Southwestern Railway Company*, 6 L. R. 14; *S. C.* 5 L. R. 98.

The fire was of course a cause of mischief, but the wind and dry grass were also efficient in communicating the fire to the building, and the negligence was in respect to the grass only. If defendant had set the grass on fire negligently, or (if that had been possible) had caused the wind to blow, it would have been liable for the loss in the same manner.

On the same principle it was held in Massachusetts that one who negligently cut the hose with which water was supplied for suppressing a fire, was liable for the damage occasioned by his wrongful act. *Metallic Compression Casting Company v. Fitchburg Railroad Company*, 109 Mass. 278.

There, as in the case at bar, it was contended that the proximate cause of loss was the fire rather than the act of the defendant. But the court was of a different opinion; saying that when a man cuts off the hose "through which firemen are throwing a stream on a burning building, and thereupon the building is consumed for the want of water to

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extinguish it," his act is to be regarded as the direct and efficient cause of the injury.

In all these cases it may be said that the fire is a proximate cause of the loss, but it does not follow that it is the only cause standing in that relation to the result. And so while it is true that plaintiff's goods were in fact destroyed by fire, it is also true that the gunpowder in the warehouse, by keeping the workmen from the fire, may have contributed to the loss in such way as will make it a proximate cause. "Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause." *Shearman & Redfield on Negligence*, § 10.

Without further discussion of what appears to be plain, we have no doubt the powder was near enough to the loss to make the defendant liable for its negligence in putting it in the warehouse, if, as the jury have found, it directly contributed to the result, and this objection must be overruled. *Pittsburg & Connellsville Railroad v. McClurg*, 56 Penn. St. 294. In some cases, as where the conclusion to be drawn is not direct and certain, the rule is otherwise (17 Wall. 663); but here the facts lead in but one direction.

The defendant further relies on the objection that the question of negligence was improperly withdrawn from the jury.

It is not denied, and it cannot be successfully claimed, that where the facts are established, negligence may be a mere inference of the law to be decided by the courts. *Shearman & Redfield on Negligence*, § 11; *Lauwater v. Hannibal & St. Joseph Railroad Company*, 42 Mo. 193.

It was admitted at the trial that defendant's warehouse was in the city of Denver, and whether powder was stored there — although it was not denied — was submitted to the jury on the evidence. It is difficult to discover any other fact that entered into the question of negligence, unless it be the dangerous properties of powder, and perhaps that is the point in controversy.

In the argument of this motion at the bar, counsel were

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understood as saying that the testimony of witnesses at the trial had raised a doubt as to the effect of powder exploding in a burning building, and if the question to be decided should be as to the effect of such explosion on the building itself, and the contents thereof, their position would not be untenable. The testimony tended to prove that neither the building nor the goods therein were much injured by explosions. But this is not the point to which the evidence was directed. As before explained, the question was whether the firemen were reasonably deterred by the presence of powder in the building from effective work in extinguishing the fire. And so far was the evidence from showing or tending to show that the firemen were not so deterred, that it tended rather to establish the inference of danger to life from the presence of that article, at least as to all those who should attempt to enter the building.

So that the evidence referred to did not in any way affect the question of negligence, and if it bore on the other point, as whether the firemen were in fact hindered from operating against the fire, that matter was submitted to the decision of the jury on the evidence.

Aside from this, I cannot believe that it is in any case necessary or proper to ask a jury to find whether gunpowder is a dangerous compound. The fact is of universal notoriety, familiar to all men, and needs neither finding nor proof to establish it. What would be thought of the demand for such proof in a prosecution for assault with intent to kill and murder?

Would it be said that the government must show that the gun was loaded with powder and ball, and that powder is an explosive substance capable of expelling the ball from the gun with great force, and so on?

Generally as to the negligence imputed to defendant, it may be said that the act was not to be affected by the circumstances attending it, and therefore it was not to be decided by the jury.

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If under any circumstances the storing of powder with other goods in a warehouse in a city would be a reasonable exercise of judgment and discretion, the rule would be otherwise. Because, if the circumstances may give color to the act, and make that fair and unquestionable which otherwise must appear to be culpable, the jury would have to determine whether by the circumstances the act was relieved of the character ascribed to it. But such, it is believed, cannot be the rule as to any such misconduct. There was nothing in the evidence upon which the jury could say that the act of putting powder in the warehouse was not negligence, and therefore there was nothing to be determined by them on that point, except the matter of putting it there, which was left to them to decide on the evidence.

Whether the presence of the powder in the warehouse was the direct and efficient cause of the loss was not, as it could not be, conclusively shown. But the evidence on that point is regarded as sufficient to sustain the verdict. That was peculiarly a question for the jury. *Milwaukee R'y Co. v. Kellogg*, 4 Otto, 474. We do not feel at liberty to disturb the verdict on that ground. And we have not been able to discover any error in any part of the record.

The motion is denied.

J. Q. Charles, for plaintiff.

Willard Teller, for defendant.

HUTHSING v. BOSQUET *et al.*

(*District of Iowa. February, 1882.*)

1. CONTRACT — PUBLIC OFFICER — LOCAL STATUTE — NON-RESIDENT.

When a party in one state makes a contract with direct reference to the law of another state, he must be held to know the law of the latter state, and to have direct reference thereto. The former ruling in this case, reported in 2 McCrary, 152, concerning liability of defendants as officers of Marion county for a reward offered for the apprehension of public offenders, reaffirmed.

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In the year 1876 the defendants were members of the board of supervisors of Marion county, Iowa, and in that capacity offered a reward for the apprehension of the parties guilty of a robbery of the treasury of said county. In offering said reward the defendants acted in good faith, believing they had the right and power to take such action in behalf of said county under the statute of Iowa. It was, however, subsequently decided by the supreme court of Iowa that the board had no such power, and the county is, therefore, not liable.

The plaintiff and one Lawler, who acted with him, acting upon said offer of a reward, arrested one John R. Barcus at Atchison, in the state of Kansas, and delivered him over into the hands of the sheriff of Marion county, and also recovered something over \$3,000 of the stolen funds. The case was before the court sometime since upon a demurrer to the original petition, which was sustained, and the facts as they appeared upon the face of the original petition were fully stated in the opinion of the court. See 2 McCrary, 152.

Upon the announcement of the opinion the plaintiff took leave to file an amended petition, and the case is now submitted to the court for final determination upon an agreed statement of facts, which is as follows:

“It is hereby stipulated and agreed by and between the parties to the above entitled action, that said cause be submitted for determination and judgment to the court, and that in the determination of said cause the following agreed statement of facts shall be taken and considered as true, without further proof thereof, but subject to any legal objection that may be urged in argument by either party on the ground of incompetency, irrelevancy or immateriality.

“1. That the plaintiff and said Lawler are now, and have continuously been, citizens and residents of the state of Missouri since prior to the year A. D. 1876, and that the defendants are, and for many years have been, residents and citizens of the state of Iowa.

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“ 2. That in the year A. D. 1876 the board of supervisors of Marion county, in the state of Iowa, was composed of three members only; and that the defendants, Herman F. Bosquet, A. A. Welsher, and one H. D. Lucas, being the chairman of said board. That the term of office of said Lucas expired on the thirty-first day of December, 1876, and he was succeeded by the defendant, John B. Ely, who served as such supervisor for three years next succeeding thereafter.

“ 3. That on the tenth day of October, 1876, the office of the treasurer of said Marion county was robbed of about ten thousand and five hundred dollars (\$10,500) of money belonging to said county, by two men who entered the said office and by threats compelled the treasurer of said county to open the safe and deliver said money to them, and that John R. Barcus and Harry Williams are the persons who committed said robbery.

“ 4. That on the morning of the eleventh day of October, 1876, said Bosquet, Welsher and Lucas met at Knoxville, the county seat of said county, without notice or request therefor having been given, and without any of the steps having been taken as provided in section 301 of the code of Iowa for the holding of special meetings of boards of supervisors, but having convened, with other citizens, solely on account of said robbery, for the purpose of taking such action in relation thereto as might be deemed best, they, the said Bosquet, Welsher and Lucas, then and there while thus convened, issued and caused to be published and circulated the offer of reward referred to and set out in the original and substituted petition herein, and sent a copy thereof to the chief of police of the city of St. Louis, Missouri, which was seen and read by the plaintiff, and by said Patrick Lawler, on or before the sixteenth day of November, 1876. It is agreed that the said Bosquet, Welsher and Lucas, at the time they issued the said circular, did not meet or organize as a board, nor pass any resolution in any formal or informal manner adopting said offer of reward, nor make any

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record of their proceedings, but were individually present in the treasurer's office, and merely consulted together as to the propriety of making said offer, and agreed thereto, whereupon the said offer was written out and signed by said H. D. Lucas, chairman, in the presence of the defendants Bosquet and Welsher, and the said offer was, by the direction of the said Bosquet, Welsher and Lucas, printed and circulated.

" 5. That in making and circulating said offer of reward said Bosquet, Welsher and Lucas acted in good faith, believing they had the right and power to make the same on behalf of said county in the manner as herein stated, and that if the terms of said offer were complied with, it would entitle the party who might perform such service to the reward therein offered from said county, but did not intend to make such offer as a personal offer by said board, or its individual members in their individual capacity. Nor did said supervisors intend that said circular should be understood to be a personal offer by them, but intended to make the same in their official capacity only, as the board of supervisors of said Marion county.

" 6. That after the plaintiff and the said Lawler had seen and read said circular, and with a view to obtain said reward, to wit, on or about the sixteenth day of November, 1876, they recovered about the sum of (\$3,071) three thousand and seventy-one dollars of the said stolen funds of said county in the city of St. Louis, Missouri, and placed the same in the hands of the chief of police of said city, subject to the order of said county; and also on or about the twentieth day of November, 1876, arrested the said John R. Barcus at Atchison, in the state of Kansas, and in a few days thereafter delivered him over into the hands of the sheriff of said Marion county. That said Barcus was duly convicted of said robbery in January, 1877, and is now serving out his sentence in the penitentiary.

" 7. That when said printed circular came to the notice of

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plaintiff and said Lawler, and when they performed the services herein mentioned and referred to, they and each of them understood and relied on such circular and the offer of reward therein contained as being made solely on behalf of said Marion county, and not on behalf of the supervisors who issued and published the same. That they and each of them expected the compensation promised in said circular to be paid by said county and not by said supervisors personally, nor by any of them. That neither plaintiff nor said Lawler knew the name of any member of the board of supervisors of said county, except said H. D. Lucas, until after they had performed all the services for which compensation is claimed in this action, and had at the time of said services no actual knowledge, information or belief that under the laws of Iowa supervisors were not legally authorized to issue said offer of reward, but had only such knowledge as imputed by law.

“8. That about the month of January or February, 1877, plaintiff and said Lawler filed with the auditor of said Marion county an account (a copy of which is hereto annexed and marked A) against said county, duly verified, claiming of said county the reward sued for in this action, and also for expenses; and that afterwards said plaintiff and said Lawler sued said Marion county for the reward sued for herein, and also for the reward on the money recovered by them, and for their said expenses; and that upon issues joined in said action, in a court of competent jurisdiction, said plaintiff and said Lawler were adjudged to be entitled to recover of said Marion county about the sum of \$1,000, as reward for the recovery of said \$3,071, and about the sum of (\$675) six hundred and seventy-five dollars for expenses in and about the recovery of the same, and in the apprehension and delivery of said Barcus. But the question of the liability of said county to pay the reward sued for herein, for the arrest of said Barcus, was not adjudicated in said action, and the claim herein is not barred by reason of

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any former adjudication thereon, but the same was withdrawn before judgment in said case.

“9. That the acts of the supervisors, in issuing and publishing said offer of reward, were duly ratified by the said board in full and regular session, in 1877, and by repeated acts thereafter, as shown by the annexed resolutions, marked B and C and D and E, which are made a part hereof, and which it is agreed were regularly and duly adopted by said board, and spread upon its record.

“10. The court may take notice and give force to any statutes of the state of Missouri, or decisions of the law court of said state, cited in argument by either party herein, the same as though offered in evidence, and subject to the same objections as are provided for in section 1 hereof.

“11. That in case the plaintiff is entitled to recover herein for the arrest and conviction of said Lucas, it is agreed that he is to have judgment in the sum of \$2,500, and interest from May 1, 1877, being one-half the reward offered, if the court shall hold that said reward is apportionable, and if that is material.

“12. That so far as said petition herein relates to the claim for the apprehension and conviction of said Williams, the same is to stand for trial separately and subsequently hereto.

“13. That said offer of reward was issued for circulation and information of the public, and to induce parties to act thereon, and that said Huthsing and Lawler performed the work and services set forth in the petition, resulting in the arrest of John R. Barcus, as further set forth in section 6 hereof.

(Signed) “WHITING S. CLARK, for Plaintiff.

“ANDERSON & KINKEAD, for Defendants.

MoCRARY, *Circuit Judge*.—The plaintiff now seeks by his new averments and the agreed statement to put his case upon the ground of fraud. It is not pretended that there was any fraudulent intent on the part of the defendants; that they in fact acted in perfect good faith, intending to bind the county,

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and believing they had power to do so, is not questioned. How, then, does the plaintiff attempt to make a case of fraud? They say the defendants are conclusively presumed to have known the law of Iowa, and, therefore, must be held to have offered the reward knowing that the county would not be bound. They must therefore have intended to mislead and deceive the plaintiff. Now it is manifest that this reasoning is purely technical. It aims to charge the defendants upon a case of fraud in law when there was no fraud in fact. It would be a strange result in an action at law to make a defendant responsible upon a charge of fraud, while admitting that he, in fact, acted in perfect good faith.

It is, of course, necessary to this argument for the plaintiff to assume that he did not know the law of Iowa, because, if he did know the law, he was not deceived. But in my opinion this is untenable. When a party in one state makes a contract with direct reference to the law of another state, I think he must be held to know the law of that state. In all the county bond cases, it was held by the supreme court that the non-resident holder for value without notice, of county bonds, must take notice of the law of the state conferring the power to execute them, and that if the law of the state conferred no power, the innocent purchaser and holder could not recover. He was bound to know the law of the state under which the contract was made. He could not be innocent by reason of his ignorance in that regard. It never entered the mind of any one to say that, being a citizen of another state, he was not presumed to know the law of the state giving the authority to issue the bonds; and no one ever dreamed that the county officers, if they acted *ultra vires*, bound themselves personally. Why, then, was not the plaintiff in the present case bound to take notice of the law of Iowa conferring power upon the board of supervisors to offer the reward? The plaintiff saw by the very terms of the offer that the board intended to bind the county and not to make themselves personally liable. Why was he not

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bound to take notice of the law of Iowa, and see whether or not it gave the board power to make the contract upon which he sues?

If the defendants in this case can be made responsible for fraud, upon the theory that they knew the law, while the plaintiff was ignorant of it, I can see no reason why the county officers who may issue bonds in perfect good faith under a mistake of the law may not be made personally responsible upon them by any non-resident purchaser for value.

The plaintiff made a contract with the county of Marion, not with the defendants as individuals. He did service to the county, not to the defendants individually. And now, finding he cannot recover from the county, seeks to change the whole nature of the transaction. He seeks to make parties liable with whom he had no contract and for whom he performed no service.

Upon a careful reconsideration of the whole case by both judges, we are prepared to reaffirm what was said in the original opinion, and to hold that there is nothing in the amended petition upon which to base a claim for damages in favor of the plaintiff and against the defendants.

The demurrer to the amended petition is therefore sustained, both judges concurring.

NOTE.—The important question in the foregoing case is whether the plaintiff, a citizen of Missouri, was bound to know the law of Iowa defining the powers and duties of the board of county supervisors, when he entered into the contract in question. There are authorities holding that a mistake or ignorance of the law of a foreign country or of another state is to be treated as a mistake of fact. 10 Am. Decisions, 824, note. This doctrine, however, does not apply. The case is one where a non-resident contracted with citizens of Iowa, who were acting in an official capacity, and the rule affirmed by Grotius applies.

“If a foreigner makes a bargain with a native, he shall be obliged by the laws of his state, because he who enters into a contract in any place is a subject for the time being and must be obedient to the laws of that place.” Sec. 274, ch. 8, p. 428, Story on Conflict of Laws.

Lord Stowell, in *Dalrymple v. Dalrymple*, 2 Hagg. Consist. R. 61, ob-

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served that "with respect to any ignorance arising from foreign birth and education, it is an indispensable rule of law as exercised in all civilized countries, that a man who contracts in a country engages for a competent knowledge of the law of contracts of that country. If he rashly presumes to contract without such knowledge, he must take the inconveniences resulting from such ignorance upon himself." Sec. 76, p. 109, ch. 4, Story on Conflict of Laws.

Every one is understood to have contracted in the place in which he has bound himself to perform the contract. Story on Conflict of Laws, sec. 268, p. 854; *Arnold v. Potter*, 22 Iowa, 194; *Boyd v. Ellis*, 11 Iowa, 98.

This contract was made in direct relation to the laws of Iowa, and performance thereunder was to be in Iowa. Therefore the law of Iowa entered into the contract and formed a part of it, and the presumption is that the plaintiff had full knowledge of such law, and contracted with respect to it, intending thereunder to bind the county, and if he failed to do so, his mistake is one of law and not of fact.

The rule above noted does not apply for another reason.

In the case of a public agent, where his authority or that of the principal to contract is derived from a public statute, the party contracted with is presumed to know the limitations of such authority; and the doctrine that an agent, by contracting for his principal, affirms his authority, does not apply. 21 Wis. 197.

An agent for the public is not liable to be sued upon contracts made by him in that capacity. *McBeath v. Haldimand*, 1 T. R. 172; *Unwin v. Wolsely*, id. 674.

Beck, J., in rendering the opinion of the court in the case of *McPherson v. Foster Bros.* 43 Iowa, p. 67, says: "The whole world must take notice of the constitution and laws of a state;" and says, "This doctrine is recognized in *The Mayor v. Ray*, 19 Wall. 468, by four justices, Bradley, Miller, Davis and Field."

In *Brown v. Austin*, 1 Mass. pp. 214 and 215, Thatcher, judge, with Judges Sewall, Sedgwick and Chief Justice Dana concurring, says: "It appears by the record that the plaintiff in error was acting as the agent of the public. The law is settled that any person acting in that capacity who makes a contract for the public—contracts in which he has no interest or concern other than as one of the individuals comprising the body politic, does not render himself liable."

It is a general and fundamental principle of law, that all persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or its officers to make the contract. . . . So also those dealing with the agent of a municipal corporation are likewise bound to ascertain the nature and extent of his authority. 1 Dillon on Municipal Corp. p. 441, 8d ed. and authorities there cited.

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MYERS v. UNION PACIFIC R'y Co.

(*District of Kansas. February, 1882.*)

1. **REMOVAL—ACTION ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES—UNION PACIFIC RAILWAY CO.**—A suit brought by or against the Union Pacific R'y Co., a corporation formed under an act of congress as shown by the record in this case, is not necessarily a suit arising under the laws of the United States, so as to be removed on that ground from a state to a federal court.
2. **SAME—SAME.**—A suit cannot be removed upon the sole ground that it is a suit by or against a corporation organized under the laws of the United States.

On motion to remand.

McCRARY, *Circuit Judge*.—Upon consideration of this motion I have reached the following conclusions:

1. It is not necessary to decide the question so much discussed by counsel as to the validity of the agreement of consolidation. I assume that it is valid, and upon that assumption hold:

2. That the present suit is not one "arising under the constitution or laws of the United States," within the meaning of the second section of the act of congress of March 3, 1875, providing for the removal of causes from the state to federal courts.

3. That a suit by or against the Union Pacific Railway Company, a corporation formed in the manner disclosed in the record, is not necessarily a suit arising under the laws of the United States so as to be removed on that ground from a state to a federal court.

4. Even assuming that the defendant is a corporation organized under the laws of the United States, I am still of the opinion that the motion to remand should prevail, because I hold that a suit cannot be removed from a state to a federal court upon the sole ground that it is a suit by or against such a corporation. The causes of removal prescribed by statute

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are of two kinds, namely, those respecting the character of the parties, and those respecting the subject matter of the suit. Of the former kind are suits in which there is a controversy between citizens of different states, or in which the United States or an alien shall be a party; of the latter kind are suits arising under the constitution or laws of the United States. A corporation may remove a cause upon the ground of citizenship, and upon the presumption that the incorporators are citizens of the state under whose laws it was organized. A corporation may also remove a suit upon the ground that it arises under the constitution or laws of the United States.

In the present case the removal was sought upon the latter ground, and it appears from the record that it is based upon the single alleged fact that the defendant is a corporation organized under the laws of the United States; from which fact the inference is sought to be drawn that the case of the plaintiff being a suit to recover damages for personal injuries caused by the defendant's negligence, is a case arising under the laws of the United States. To this proposition I do not agree. The inference does not necessarily follow from the fact. The removal is sought on account of the character of the subject matter of the suit, not because of the character of the parties. It is necessary that the record should show affirmatively that the cause of action or defense arises upon the construction of, or upon a claim of right arising under, some law of the United States, or of a treaty, or of some provision of the constitution of the United States. A suit against the defendant corporation is not necessarily a case which arises under a law of the United States within the meaning of the removal acts. The question is not the same as that decided in *Osborne v. United States Bank*, 9 Wheat. 738. The question there decided was whether congress had power under the constitution to give circuit courts jurisdiction in suits against the United States Bank, irrespective of the subject matter of such suits. The affirmative of this ques-

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tion was established. But there is no law of congress authorizing the present defendant to remove a case brought against it into the United States circuit court on any other terms than those provided for all other persons and corporations. It is not provided that all suits in the state courts by or against the defendant may be removed. If it was so provided, then a question analogous to the one decided in *Osborne v. The Bank*, namely, the constitutionality of such an act, might arise, and upon the authority of that case it would no doubt be held that congress has power under the constitution to treat all such cases as within the judicial power of the United States. The question here, however, is not what congress might do, but what it has done; and I hold that it has not provided for the removal of every case brought by or against a federal corporation upon the sole ground that it is a corporation organized under the laws of the United States.

I am authorized to say that Mr. Justice Miller concurs in these conclusions. It follows that the motion to remand must be sustained. As the questions arising upon this motion are important, affecting as they do a class of cases in this and other districts, it is desirable, of course, that a determination of them by the supreme court be had without unnecessary delay; and as they relate to the jurisdiction of the court, it is possible, under the recent rule of the supreme court, to have them decided by that tribunal at an early day.

Thomas P. Fenlon, for plaintiff.

J. P. Usher and *A. L. Williams*, for defendant.

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HUNTINGTON *et al.*, Trustees, v. LITTLE ROCK & FORT SMITH
R. Co. *et al.* No. 138.

SAME v. SAME. No. 139.

(*District of Arkansas. April, 1882.*)

1. **EQUITY — DECREE — FINALITY — CORPORATION — BONDHOLDERS.**— A decree in a suit in equity brought to foreclose a mortgage given to secure certain bonds, and in which suit the bondholders were represented by their trustees, is conclusive upon the bondholders, especially where the bondholders were cognizant of the proceedings, appeared in the cause, and sought and obtained certain orders therein, and were heard from time to time upon questions affecting their interests.
2. **FINAL DECREES — HOW MODIFIED OR SET ASIDE.**— Final decrees in equity may be modified or set aside, (1) by appeal within the time prescribed by law; (2) by bill of review filed within the time allowed by law for appeal, charging error apparent upon the face of the record; (3) by original bill charging fraud or newly discovered evidence.

McCRARY, *Circuit Judge.*— These cases are before the court upon demurrer to the petitions of Frank Shaw and David S. Greenough, filed therein after final decrees, and praying certain relief. The facts, so far as we deem it necessary to state them, are as follows:

I. These suits were severally brought in 1874 to foreclose the railroad and land grant mortgages, which had been previously executed by the defendant railroad company, and they were instituted by the trustees named in the mortgages for the use and benefit of the holders of the bonds secured by the mortgages. The present petitioners were bondholders.

II. On the sixth of November, 1874, decrees were rendered foreclosing the mortgages and ordering the sale of the mortgaged property for the purpose of paying the mortgage debt with interest and costs.

III. On the tenth of December, 1874, the properties described in the mortgages were separately sold by the master, for \$50,000 each, to Geo. O. Shattuck, Francis M.

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Weld and George Ripley, who purchased on behalf of, and in trust for, the bondholders. These sales were duly reported to, and confirmed by, the court, on the nineteenth day of December, 1874. The decree of confirmation in the suit upon the railroad mortgage No. 138, recites that "George O. Shattuck, Francis M. Weld and George Ripley, the purchasers of the property sold under said decree, being severally personally present, declare and state in open court, and desire the same to be entered of record, that it is their intention, immediately upon the confirmation by this court of the aforesaid sale, to organize a corporation under an act of the general assembly of the state of Arkansas, approved December 9, 1874, entitled 'An act supplementary to an act, entitled an act to provide for a general system of railroad incorporation, approved July 23, 1868;' which corporation shall own, hold and manage the property conveyed under the aforesaid sale, as well as the lands and property conveyed or to be conveyed under the sale held by virtue of the decree rendered on the sixth day of November last past, in the suit of Charles W. Huntington, Samuel H. Gookin and Elisha Atkins, trustees, v. The Little Rock and Fort Smith Railroad Company *et als.*, No. 139 upon the docket of this court; and that any holder of the bonds secured by the mortgage foreclosed by this suit, as well as of the bonds secured by the mortgage foreclosed by the aforesaid suit numbered 139, shall, upon the transfer of his bonds, and his right to any of the proceeds of the sales of the railroad or land grant, under the aforesaid decrees in said suits numbered 138 and 139, within sixty days from the date of such organization, unless further time shall be given by the court, be entitled to his proportional interest in the stock of said new corporation, upon the same terms and stipulations as any other holder of said bonds; but this shall not prevent such new corporation from requiring from any and all holders of said bonds the payment of his proportion of the expenses attending said sales and purchases, and such other

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sums, not exceeding five per cent. on the principal of said bonds, as said corporation may deem it for its interest to require as a condition upon which said stock shall be delivered; provided, that the same requirement be made of all the other holders of said bonds; and provided further, that this stipulation shall not limit the power of the aforesaid Shattuck, Weld and Ripley to organize said corporation without notice, or of the corporation so organized to mortgage its property, or to reserve for its own use an amount of its capital stock not exceeding ten per cent. thereof." And the decree in the suit upon the land grant mortgage No. 139 contained substantially the same recitals.

IV. The following order was also made a part of said decree of confirmation in No. 139: "That said corporation shall, as part of the consideration of such conveyance, compromise or pay such claims against the Little Rock & Fort Smith Railroad Company as C. W. Huntington, George Ripley and Henry A. Whitney may within one year from the date hereof approve, and on such terms and in such manner as they may prescribe."

V. On the twenty-second day of February, 1875, the above named petitioners, Shaw and Greenough, and one Richardson, filed their petition in the land grant suit, praying that the provision of the decree of confirmation last above quoted be stricken out, and for an extension of the time within which bondholders might elect to take stock in the new corporation, until the question whether such modification should be ordered, could be decided. Issue was joined upon this petition; a hearing had, and at the April term, 1875, the court refused to modify the decree of confirmation in the manner desired by the petitioners, but added to the provision last above quoted the words: "Subject to the approval of this court," so as to require the acts of the committee appointed to settle claims against the railway company to be approved by the court; and the court further ordered that twenty days' notice of the application for such approval should be given to

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the petitioners or their solicitors, and that they should be allowed to appear and oppose such approval and to introduce evidence. It was further ordered that petitioners, and all other bondholders who had not yet expressed their assent to the action of the trustees and the decree of the court, by taking stock in the new company, have the further time of sixty days in which to elect whether they would become members of this new company, or take their proportional share of the moneys in court.

VI. The petitioners did not elect to become stockholders in the new corporation upon the terms prescribed by these decrees and orders, but in July, 1875, they filed their bills of review to set aside the decrees of sale and confirmation for alleged errors appearing upon the face of said decrees. To these bills of review the respondents demurred, and, upon hearing, the demurrers were sustained and the bills dismissed. The petitioners appealed from the decrees dismissing their bills of review to the supreme court of the United States, and upon hearing in that court, said decrees were on the fifth of April, 1880, affirmed.

VII. The committee appointed to adjudicate claims against the railroad company made their awards as required by the decree, which, after notice to petitioners and a hearing, were confirmed.

VIII. The master who made the sales made his final report, which was approved and confirmed by decree of the court, rendered in 1876.

IX. After the decision of the supreme court above mentioned, to wit, on the nineteenth day of October, 1880, the petitioners filed their petitions now under consideration, in which they aver that, in declining to comply with the terms of the decree of this court, and in filing their bills of review to set aside the same, and in appealing from the decree of this court dismissing said bills of review, they acted upon the advice of counsel, honestly believing that said sales were improperly made, and that the decrees confirming them

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should be set aside. The petitioner Greenough set forth, as an additional reason so far as he is concerned, that he was unable to comply with the terms of the decrees, for the reason that the bonds held by him were held in trust for parties who were unable to supply any money, etc. What the petitioners desire is that they may now be permitted to make their election, to surrender their bonds, and take stock in the new corporation, and such is their prayer. The trustees demur to these petitions, and thereby raise the question whether the court has jurisdiction to entertain them.

It is entirely clear that no proceeding whatever by the petitioners can be entertained as a part of the original suits. By the final decrees no right was reserved to any of the parties or to any others interested, to apply for further orders, and the court reserved no right to make such orders.

Final decrees were rendered more than five years ago. It is now too late to inquire whether they were in all respects equitable and just; but that they were so is fully established by the decision of the supreme court of the United States affirming the decree of this court dismissing the bills of review. *Shaw v. Railroad Company*, 100 U. S. 605. That these decrees are final, and that they are conclusive upon the petitioners, is a proposition too plain for argument. The petitioners, as bondholders, were represented in those suits by their trustees; they were also cognizant of the proceedings, and they appeared in the cause and sought and obtained certain orders; they were heard from time to time upon questions affecting their interests, and they contested the validity of the final decrees by filing bills of review and prosecuting the same to final decision in the supreme court of the United States. Final decrees in equity may be modified or set aside in either one of three modes: (1) By appeal within the time prescribed by law; (2) By bill of review filed within the time allowed by law for an appeal, charging error apparent upon the record; and (3) by original bill charging fraud or newly discovered evidence. The petitioners chose

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to adopt the second method of contesting the decrees in question, and they are concluded by the adverse decision of the supreme court. It is therefore entirely clear that the petitioners have exhausted their remedy, so far as it was to be had by any form of proceeding in the original suits, and that if they have any remaining rights which a court of equity will enforce, they must seek relief by an independent and original proceeding, in which they must assert no right or claim in hostility to, or inconsistent with, the adjudications already had. It is not necessary, at present, to determine whether in an original procedure the petitioners can show themselves entitled to relief without seeking a modification of the original decrees. What has been said disposes of the question now before us. The demurrer to the petition is sustained and the petition will be dismissed. See *Pacific Railroad v. Missouri Pacific Railway Company*, 2 McCrary, 227.

CALDWELL, *District Judge*, concurs.

B. C. Brown and Moorfield & Story, for complainants.

C. W. Huntington, for respondents.

PRYZBYLOWICZ v. MISSOURI RIVER R. R. Co.

(*District of Kansas. November, 1881.*)

1. CONSTITUTIONAL LAW—TAKING PRIVATE PROPERTY FOR PUBLIC USE — COMPENSATION.— Under the provisions of the constitution of the United States and of the state of Kansas, it is held that the payment of compensation to the owner of private property taken for a public use is a condition precedent to any right divesting the owner of his possession, and that a judgment in his favor for the value of the land, unpaid and unsecured, is not compensation, and does not justify his eviction.
2. ESTOPPEL — LICENSE TO USE LAND AS RIGHT OF WAY FOR RAILROAD.— The owner of land which has been taken by a railroad for

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its right of way may by his own act estop himself from demanding actual payment of the compensation as a condition precedent to the taking and using of the same. This may be done by license either express or fairly implied; and such license will be implied if the owner expressly consents, or with full knowledge of the taking makes no objection, but permits the corporation to enter upon, expend money, and carry into operation the purposes for which it is taken.

3. **EJECTMENT OF RAILWAY COMPANY FROM RIGHT OF WAY.**—If the owner of land has licensed a railway company to take the same for right of way, and has permitted it to expend money in constructing its road for a period of ten or twelve years, he is estopped, and cannot now be permitted to eject the company.

FOSTER, District Judge.—The constitution of the United States provides that private property shall not be taken for public use without just compensation, etc.

The constitution of this state contains the wise and salutary provision that right of way shall not be taken by any corporation without full compensation therefor be first made, etc.

And the supreme court of this state, and the courts of other states having a like provision, hold that the payment of this compensation is a condition precedent to any right divesting the owner of his possession. That a judgment in his favor for the value of the land, unpaid and unsecured, is not compensation made, and does not justify the dispossessing the owner of his property.

With this rule of law we are in full accord, and regard it as based upon the highest and most sacred principles of justice.

But going hand in hand with this doctrine is another rule of law which is also well grounded in justice and right, and which is recognized and enforced by the courts, and that is, that the owner of the land may by his own act estop himself from demanding actual payment of the compensation as a condition precedent to the taking for public uses.

If the owner gives license either express or fairly implied; if he expressly consents, or with full knowledge of the tak-

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ing makes no objection, but permits the public corporation to enter upon and expend money and carry into operation the purposes for which it is taken, he may not then be permitted to eject the parties from the possession for want of payment of the compensation.

The plaintiff in this case has no higher or greater rights in law or equity than Mrs. Mills, his grantor, would have if she was the plaintiff in this action. And if his grantor would have been estopped, then this plaintiff is estopped.

If Mrs. Mills had knowledge that this railroad company had taken possession of this land, and made no objection, but permitted the company to build its road and operate its trains over this land, and exercise all the rights appertaining to a right of way for public uses for a period of ten or twelve years, she cannot now be permitted to eject the company from the land.

I have found from all the evidence in this case that Mrs. Mills did have this knowledge and did acquiesce in the possession of the railroad company.

It is true there was no direct and positive evidence as to whether she did or did not have such knowledge and make such acquiescence, but in the absence of any evidence on this point, it would not be a rash presumption to hold that an open, palpable and notorious possession by the railroad company, for a period of so many years, would not likely occur without knowledge of the owner, living much of the time in the vicinity of the land. But in addition to this, in the condemnation proceedings this land is mentioned as a part of the right of way of the said road. Mr. Mills, her husband, gave his written consent that the road might pass through his land (presumably this land of his wife).

Mrs. Mills had relatives living in Leavenworth and visited there herself; she also had an agent there who looked after her land and paid taxes on it, as I remember the evidence; and she probably had traveled over this railroad in going to or from Leavenworth. From all these facts and circum-

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stances, it requires greater credulity than I am possessed of to believe she had no knowledge of the possession of the railroad company.

On these facts and the law applicable thereto, this plaintiff cannot recover, and the motion for a new trial must be overruled.

DES MOINES & MINNEAPOLIS RAILROAD Co. v. ALLEY et al.

(*District of Iowa. February, 1882.*)

1. **EQUITY PLEADING — FRAUDULENT CONVEYANCE — CONSIDERATION.**— A bill in equity brought to set aside a conveyance of real estate fraudulently executed, and which avers that the conveyance was without any consideration, is sufficient; but if the bill admits that there was a consideration paid for such conveyance, it is necessary to aver an offer to return the same.
2. **SAME — SAME.**— In such a case it is necessary to aver either that the conveyance was wholly without consideration, or that there was a consideration which the complainant has offered to return, or that the complainant is not informed, and has no means of ascertaining, whether there was a consideration, and what the value of the consideration was, if there was any, and that these facts are peculiarly within the knowledge of the respondent.

In equity. Demurrer to complainant's amended bill.

McCRARY, Circuit Judge.— This is a suit brought to set aside a deed executed by the complainant to the respondent, John B. Alley, on the twenty-third of May, 1879, conveying two thousand three hundred and sixty-two acres of land. The amended bill charges that at the time of said conveyance, the respondent, John B. Alley, was the owner of the majority of the stock of the corporation, and by reason of that ownership exercised a controlling influence over the officers and directors of the complainant corporation, whereby he induced the board of directors and the president of the corporation to consent to the said conveyance, and to execute a deed good and sufficient in form. It is further alleged that the said respondent, John B. Alley, fraudulently pro-

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cured and caused said conveyance to be executed. With respect to the consideration paid by the said Alley for said conveyance, there are two allegations in the amended bill as follows: It is first alleged, "That in truth and in fact, the said defendant did not pay anything whatever for said lands; that the books of said company were then under his charge and control; and that he caused to be charged to himself on account of said lands and said conveyance, the sum of \$4,600, and over against said charge on said book he caused to be credited certain fraudulent entries."

If the allegation stopped here, it would amount to a charge that the conveyance was without any consideration whatever, and would be entirely sufficient. But the bill further avers as follows: "That if, in truth and fact, it shall be made to appear that any portion or all of said \$4,600 was in any manner paid by the said Alley, by just and proper credits, then the said sum or price of said lands was, and is, grossly inadequate to its true value; and the said defendant, by reason of his relationship to the said company plaintiff, and such inadequacy of price, is bound to surrender said lands to the plaintiff. That said lands were then worth, as plaintiff is informed and believes, \$10,000 and more, and have been since then steadily increasing in value; and defendant well knew that said lands were worth much more than the sum of \$4,600, and that they would greatly increase in value from that time forward."

It is necessary that the several allegations of the amended bill should be harmonious and consistent with each other. The amended bill would be sufficient if it distinctly alleged either of three things, to wit:

1. That the conveyance was wholly without consideration; or
 2. That it was fraudulent, and there was a consideration, which the complainant has offered to return to the respondent John B. Alley; or
 3. That complainant is not informed, and has no means
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of ascertaining, whether there was a consideration, or what the value of the consideration was, if there was any, and that these facts are peculiarly within the knowledge of the defendant John B. Alley.

If the case is placed upon the latter ground, then the amended bill should pray a discovery of the facts, and should offer to return any consideration actually paid, to the respondent John B. Alley, as soon as the same is ascertained and determined by the court. It will be seen that it is necessary to amend the bill in order to conform to these suggestions. The allegation concerning the value of the land should also be made specific. It is not sufficient to state that the complainant believes the land to be worth \$10,000. In these respects, and to this extent, the demurrer is sustained, and the complainant has leave to amend by the February rules, and will serve a copy of his amendment upon the counsel for respondent.

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SWEET'S ADM'RS v. CHICAGO, M. & ST. P. R'Y Co.

(District of Minnesota. April, 1882.)

1. **REMOVAL OF CAUSE — ACT OF 1866.**— The second subdivision of section 639 of the Revised Statutes was repealed by the act of 1875, so far as subdividing the cause of action.
2. **SAME — ACT OF 1875.**— Where the petition contains all the jurisdictional facts necessary to effect a removal under the second clause of the second section of the act of March 3, 1875, but the prayer of the petition did not ask for the removal of the entire suit, the cause will be remanded.
3. **SAME — JURISDICTION.**— When a sufficient case for removal is made in the state court, the jurisdiction of that court is at an end, and the jurisdiction of the federal court attaches; and the fact that only a part of the record is filed in the federal court will not oust its jurisdiction.

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4. JOINT TORTFEASORS — SEVERABLE ACTION — RIGHT OF REMOVAL.—

Where an action is brought against a resident and non-resident defendant sounding in tort, and each is liable as a wrongdoer, and the controversy is severable, the party bringing the suit cannot, by joining the non-resident defendant, debar him from asserting a right given by the act of 1875.

NELSON, *District Judge*.— The plaintiff, Ethan A. Clark, by guardian, commenced an action December 1, 1880, in a court of the state of Minnesota, against the Chicago, Milwaukee & St. Paul Railway Company, and the Southern Minnesota Railway Company, to recover damages for a personal injury. The action is one sounding in tort. The complaint alleges the defendants are joint wrongdoers, and sets up that the defendant the Chicago, Milwaukee & St. Paul Railway Company is a Wisconsin corporation, and the defendant the Southern Minnesota Railway Company is a Minnesota corporation. The former demurred to the complaint; the latter answered. At the January term of the said state court, 1881, being the first term after the action was commenced, the Wisconsin corporation filed a petition for removal, setting forth in substance that the plaintiff was a citizen of the state of Minnesota, and that the petitioner was a corporation existing and organized under the laws of the state of Wisconsin; that the amount in dispute exceeded the sum of \$500, and that this action is one in which there can be a final determination of the controversy, so far as concerns the petitioner, without the presence of the other defendant as a party to the cause, and alleged that the petitioner "files and presents a bond, with good and sufficient surety, for entering in the circuit court of the United States for the district of Minnesota, on the first day of the next session, copies of all process, pleadings, depositions, and testimony in the cause concerning or affecting your petitioner," etc.; and finally asks "that this cause proceed no further in the state court as against your petitioner, and that this cause be removed as against your petitioner into the circuit court of the United States for the district of Minnesota."

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The following order was entered by the state court:

“Ordered, that this cause be and the same is removed into the circuit court of the United States for the district of Minnesota, *so far as* the said petitioner is concerned, leaving the same to proceed in this court as against the defendant, the Southern Minnesota Railway Company.”

The petitioner followed, in drafting the petition, the language contained in the second subdivision of section 639 of the Revised Statutes, and the state court manifestly supposed that the removal was applied for under that subdivision only. The record filed in this court February 26, 1881, contains only the petition and bond, complaint and amended complaint, and the demurrer interposed by the defendant petitioner.

A motion to remand is made by the plaintiff, and it is urged:

“*First.* That the attempt to sever the controversy, and to remove a portion thereof into the federal court, did not deprive the state tribunal of its jurisdiction over the whole.”

The purpose of the order of the state court undoubtedly was to part with jurisdiction only so far as the controversy concerned and affected the non-resident petitioner, and intended to retain the same and determine the controversy so far as it concerned the resident corporation. In other words, as its action is expressed by the order made, it attempted to split the suit, upon the view entertained that the second subdivision of section 639, Revised Statutes, embracing the provisions of the law of 1866, was still in force. This subdivision, however, is repealed by the act of 1875 (*Hyde v. Ruble*, October term, 1881, U. S. Sup. Ct.), and the suit could not be thus divided.

Unless a sufficient case was made by the petitioner when he instituted proceedings to effect a removal under the second clause of the act of 1875, the state court, notwithstanding the order made, has not lost rightful and legal

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jurisdiction of the entire suit. Has the petitioner properly asserted his right to a removal of the suit under the act of 1875? The petition contains all the jurisdictional facts necessary to effect a removal under the second clause of the second section of the act of 1875; but the prayer of the petition did not ask for the removal of the entire suit, but "that this cause be removed, as against your petitioner, into the circuit court of the United States for the district of Minnesota," and the full record is not transferred.

When a sufficient case for removal is made in the state court, the jurisdiction of that court is at an end, and no further proceedings can rightfully and properly be entertained unless its jurisdiction is restored. *Railroad Co. v. Mississippi*, 102 U. S. 141. The jurisdiction of the federal court attaches and that of the state court is lost,—not on account of any order made with reference to the removal by the state court, but when under the law, in proper form, a removal is demanded and a case made.

It is true the federal court cannot proceed until the record under the law is filed therein, but no action of the state court is necessary to change the jurisdiction. While in this case the prayer of the petition would seem to limit the relief to the transfer of a part of the suit, there is nothing in the law of 1875 which would justify the federal court on that account to remand, if by the record before the court, and filed therein, the suit appears to be within the jurisdiction of the court. The petitioner desired, so far as it was affected by the suit, to remove it. It filed its petition in time, and embraced in its petition jurisdictional facts sufficient to authorize a removal under the second clause of the second section of the act of 1875. The fact that only a part of the record is filed in this court does not oust its jurisdiction, for it is not conferred by the entry of the record, but by the petition presented to the state court in proper form stating a case within the law of 1875. In my opinion the state court

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lost jurisdiction of the suit when the removal proceedings were instituted, and its jurisdiction has not been restored by anything which has taken place since.

Again, it is urged that there is no case disclosed by the record before this court within its jurisdiction.

The plaintiff brought his action against both the resident and non-resident defendants sounding in tort. Each defendant was liable as a wrongdoer if the plaintiff proved his case, and the controversy was severable. The plaintiff could have sued either without the other being a necessary party; or, as he did, sue both as joint wrongdoers. This is a legal privilege the plaintiff could exercise; but he cannot, by joining in the suit the non-resident defendant, debar him from asserting a right given by the act of 1875.

The act of each defendant is several in its nature, although the plaintiff has an election to sue one or both tortfeasors.

The motion to remand is denied, and the non-resident defendant can take such further action as may be deemed necessary.

This decision applies to the case of *Sweet's Adm'rs v. C., M. & St. P. R'y Co.*, and the same order is entered therein.

Lovely & Morgan, for plaintiff.

Cameron, Losey & Bunn, for defendant.

HORNER v. CARTER and another.

(*Eastern District of Missouri. April, 1882.*)

1. CORPORATIONS — DISSOLUTION — CREDITORS — R. S. MO. § 744.— Section 744 of the Revised Statutes of Missouri requires a *pro rata* distribution of assets of dissolved corporations among their creditors, where such assets will not suffice to pay all demands in full.
2. SAME.— Where the president and directors of a dissolved corporation divide its assets among the stockholders, or appropriate them to their own use, and leave a debt due from the corporation unpaid, the party

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to whom this debt is due cannot maintain an action at law against such president and directors, under said section of the Missouri statutes, unless (1) the amount due such creditor has been previously ascertained in proceedings in equity; or (2) this demand is the only one which existed against the corporation at the time of its dissolution, and the assets received by the president and directors equalled or exceeded it in amount.

8. SAME — PLEADING.— Unless the petition avers one or the other state of facts it will be demurrable.
4. SAME.— Whether the facts out of which the dissolution of the corporation resulted should not be averred, *quære*.

General demurrer to the petition

TREAT, *District Judge*.— The proposition involved arises under section 744 of the Revised Statutes of Missouri. That section is in these words:

“Upon the dissolution of any corporation, . . . the president and directors, or managers of the affairs, of said corporation at the time of its dissolution, by whatever name they may be known in law, shall be trustees of said corporation, with full powers to settle the affairs, collect the outstanding debts, and divide the moneys and other property among the stockholders, after paying the debts due and owing by such corporation at the time of its dissolution, as far as such money and property will enable them; to sue for and recover such debts and property by the name of trustees of such corporation, describing it by the corporation name, and may be sued by the same; and such trustees shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall have come into their hands.”

The plaintiffs have sued under an alleged demand against a dissolved corporation, the two defendants, on the ground that at the date of the dissolution they were directors or managers of said corporation. Is such a case maintainable at law? In courts where state statutes have not commingled law and equity proceedings, and where there are no stat-

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utes controlling or subverting recognized proceedings in equity, no question would be debatable in a case like the present. Does the statute quoted subvert the recognized rules in equity, or substitute therefor a new mode of proceedings, or merely give an additional remedy?

A corporation is liable for its debts. If it is dissolved, its directors and managers must, under the statute, as trustees, proceed to wind it up. They must, as such trustees, apply the assets in their hands to the payment of said debts in the first instance, and are "jointly and severally responsible" to the extent of assets which have come into their hands for its faithful administration. If the corporation is dissolved, it may be that no need exists under the statute for a suit against it to establish the supposed debt before proceeding further, as would have ordinarily been the case in equity against an existing corporation; that is, first obtain judgment against the corporation. The Missouri statute does not contemplate that suits at law may be brought by each creditor against such statutory trustees, and judgment had accordingly against them personally, irrespective of the extent of assets in their hands, and of the many demands that may exist against the same for *pro rata* distribution. It may be, if no demand save plaintiff's exists, and the assets are equal thereto, he may pursue the trustees therefor at law. To do so at law his averments must be accordingly, and must be such as to show by facts stated what will enable the court to determine as a matter of law that a dissolution has occurred whereby the defendants have become statutory trustees; also that there were assets in the hands of said trustees applicable to the payment of the plaintiff's demands, and equal to the amount claimed, there being no other demands prior or equal in right against said assets. If this course is to be pursued, instead of the usual one in equity, it is evident that the trust estate must have been first settled, or that the plaintiff's demand is the sole one.

It seems that the statute contemplates a mode of winding

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up a dissolved corporation, whereby its directors or managers are charged with a trust enforceable against them as trustees. They are jointly and severally responsible for the due administration of the trust, but are not jointly or severally *liable* for the debts of the dissolved corporation, irrespective of its assets, and the legal and equitable mode of distributing the same. It may be that if their maladministration of the trust had caused the plaintiff to suffer, an action at law would lie against them personally; and, if so, the petition should be full enough to show that personal liability had supervened their representative liability. The petition avers, in the affirmative, that without paying the debts of the corporation they had divided the assets among the stockholders, or had appropriated said assets to their personal use. If said trustees have so done, they ought to answer to the plaintiff, and to all other creditors, for the value of assets by them received, to the extent that said assets would meet *pro rata* the demands of the outstanding creditors. What is that *pro rata*, and how ascertained? Can one creditor sue for his individual demand, and hold said trustees personally liable, without regard to other creditors equal in right? The limitation of the statute is, properly, to the extent of assets which have gone into their hands, and no further. Hence the demurrer is well taken, for it does not appear in the petition that defendants were liable to the plaintiff without a prior settlement of the trust estate. No such settlement is averred, and the plaintiffs are creditors at large against the dissolved corporation.

As the statute has not, so far as known, received any judicial interpretation, this court must decide, as of first impression, what its force and effect may be. Without stating what may be allowable under its provisions in possible cases, the decision of this court is that the statute contemplates a proceeding in equity for the settlement of the trust in the first instance; and possibly, after such settlement, a case at law for the recovery by a creditor of the sum ascertained to

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be due to him on said settlement, not paid or properly accounted for by said trustees; or, at the furthest, that there was no demand by a creditor, save plaintiffs, against said estate, whose assets were equal to the payment thereof which had been misapplied or converted by the defendants to the wrong and injury of the plaintiffs. Any other rule would pervert the statute into manifest injustice, not against the enforced trustees alone, but also against all other creditors equal in right.

There is a technical question not decided, viz., whether the general allegation that the corporation is dissolved is sufficient, or whether the facts out of which dissolution results should not be averred. There are various modes of working a dissolution,—some by formal process through due proceedings at law; and it may be, within the statute quoted, a practical dissolution through certain facts whereby the duties and obligations mentioned are devolved upon the directors or managers. Have not such parties, as enforced trustees, a right to controvert the facts upon which plaintiffs rely to make them responsible?

Demurrer sustained.

S. Herman, for plaintiff.

Hayden & Glover, for defendants.

GLOVER v. CHASE.

(*District of Minnesota. March, 1882.*)

1. **DEED AND CONSIDERATION IN ESCROW.**—Defendant purchased certain lands from plaintiff, for which he was to give him his note for the purchase price, to be delivered to a third party to be held in escrow till paid by defendant and till a warranty deed should be executed by the plaintiff, and be deposited in escrow with said third party to be delivered to the defendant. The note matured and was not paid, and plaintiff deposited a deed, executed by the proper parties, with said third party, as agreed upon, but the description of

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the land in the deed did not correspond with that mentioned in the agreement of sale. In an action by plaintiff on the note, it was held that there was no consideration and no delivery of the note to the plaintiff, for the reason that the condition of the contract had not been completed by the delivery of a deed for land described in the contract.

2. **SAME.**—The party holding the note and deed in escrow was not the plaintiff's agent, but if plaintiff had deposited a deed with him for the land described in the contract, the defendant could not prevent a recovery by plaintiff notwithstanding the note was in possession of a third party and he had failed or refused to deliver it. Such party would be recognized as the agent of plaintiff.

NELSON, *District Judge*.—This is an action on a promissory note, tried by the court without a jury, per stipulation on file. The plaintiff, to prove his case, showed the note in possession of one Folsum, and that he held it under a contract, which was produced on the trial, and is in the following words, to wit:

“This agreement, made and entered into this nineteenth day of April, A. D. 1881, by and between John E. Glover and Wellington Vannatta, of St. Croix county, Wisconsin (doing business as Glover & Vannatta), parties of the first part, and A. M. Chase, of Taylor's Falls, Minnesota, party of the second part, witnesseth: That whereas, said Glover & Vannatta have obtained title by tax deed of the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section six (6), township forty-one (41), of range nine (9) west, in Ashland county, Wisconsin, upon which is situated the Paquawanee dam, heretofore built and occupied by said party of the second part; and whereas, said party of the second part is desirous of purchasing said property of the party of the first part:

“Now, therefore, these presents witnesseth that said party of the second part agrees to pay therefor the sum of \$1,000 within sixty days after one-half of the Namekagon drive of logs for the season of 1881 is in the St. Croix boom, and has executed a note for that amount, payable at that time, to said party of the first part, and deposited the same in escrow in the hands of L. W. Folsum.

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"It is agreed that said party of the first part shall, as soon as is convenient, execute a warranty deed of said premises, good and sufficient in the law to pass the title in fee-simple to said premises to said Aaron M. Chase, and deliver the same into the hands of said Folsom, to be held by him in escrow until the said note shall be fully paid, and when so paid shall be by said Folsom delivered to said Chase. And said Chase further agrees to enter into said premises, and hold the same as the tenant at sufferance of said party of the first part, and shall have no further right or interest therein until the said note is paid, and the deed delivered to said Chase.

"In witness whereof, we have hereunto set our hands and seals the day and year first above mentioned.

"GLOVER & VANNATTA.

"A. M. CHASE.

"Signed in presence of

"L. W. FOLSOM."

The contract in terms provides for the payment of \$1,000 for the land therein specified, and the defendant executed his note for this amount, and deposited it in escrow with Folsom according to the agreement. The note reads as follows:

"\$1,000.

TAYLOR'S FALLS, April 18, 1881.

"For value received I promise to pay John Glover, or order, \$1,000, sixty days after one-half of the logs now being in the Namekagon river shall have been driven into the St. Croix boom.

A. M. CHASE."

This note, as I construe the agreement, was not to be delivered to the plaintiff until he and one Wellington Vannatta executed a warranty deed sufficient to pass the title in fee of the premises mentioned in the agreement, running to the defendant, the maker of the note, as grantee, and delivered it to Folsom, to be held by him in escrow until said note shall be fully paid, and when the note was paid the deed "shall be by said Folsom delivered to said Chase."

A deed was introduced, executed by the proper parties,

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which had been deposited with Folsom, but the description of the land does not correspond with that mentioned in the agreement, and Folsom has retained in his possession both the note and the deed. It is proved that the note, according to its terms, has matured.

The answer of the defendant denies the execution and delivery of the note, and alleges that the plaintiff is not and never was the owner or holder thereof. It is urged that the defendant, to avail himself of the defense that the note was not delivered, because the conditions of the agreement were not completed, should have so pleaded, and under his answer, as cited above, cannot avail himself of such defense. This may be true as a general rule, but in this case the plaintiff, to sustain his right to recover, showed the note in the actual possession of a stranger to the controversy, and to account for such possession was compelled to prove how he obtained it. This opened the whole transaction, and the defense that there was no consideration and no delivery of the note to the plaintiff, for the reason that the condition of the contract had not been completed, was properly urged by the defendant, and the contract itself was competent evidence. Folsom was not the plaintiff's agent. He held both the note and the deed in escrow; but, if the evidence had proved the deposit of a deed for the land described in the contract with Folsom, the latter could not prevent a recovery by the plaintiff, notwithstanding the note was in Folsom's possession, and he had failed or refused to deliver it. The law would in that case recognize Folsom as the agent of the plaintiff from the time the deed, in proper form, was executed and placed where the parties agree that it should be. As no deed in the proper form of the land described in the contract was deposited with Folsom, as agreed upon, the plaintiff has failed to prove his right to recover, and the defendant is entitled to judgment, and it is so ordered.

O'Brien & Wilson, for plaintiff.

Warner & Stevens, for defendant.

Fletcher v. New York Life Ins. Co.

FLETCHER v. NEW YORK LIFE INS. CO.

(Eastern District of Missouri. April, 1882.)

1. **INSURANCE—APPLICANT MUST ACT IN GOOD FAITH.**—A party applying for insurance is bound to answer questions concerning facts material to the risk truthfully.
2. **APPLICATION—PRESUMPTION AS TO KNOWLEDGE OF CONTENTS.**—Every one who signs an application for insurance is presumed to know its contents.
3. **SAME—RULE WHERE IT CONTAINS FALSE ANSWERS.**—Where the application for insurance contains false answers concerning facts material to the risk, no suit can be maintained upon the policy issued to the applicant, unless it can be shown that the applicant's answers were true; that the false answers were inserted by an agent of the insurance company without the applicant's knowledge; and that the applicant signed the application under the impression that it contained his answers as given.
4. **SAME—BURDEN OF PROOF.**—In such cases the burden of proving that the answers actually made by the applicant were true, and that he signed the application under the impression that they had been correctly reduced to writing, is upon the party seeking to enforce the policy.

Suit on a policy of insurance upon the life of C. S. Alford, deceased, by his executor, Thomas C. Fletcher, for \$10,000, and interest.

The defendant alleged in his answer, and it was proved on the trial, that said assured made a written application for insurance upon his life, and that a copy of the application was attached to and made a part of said policy when it was issued; that said application was signed, and contained the following questions and answers, viz.:

“Has the party [meaning said Alford] had or been afflicted since childhood with any of the following complaints?” mentioning among others, “diseases of the . . . kidneys.”
Answer. “No.”

“Name and residence of person's [meaning said Alford's] usual medical attendant. On what occasions and for what

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diseases have you required his attendance and advice?"

Answer. "Has none."

Both of which answers defendant alleges to have been false, and avers that said Alford had previously been afflicted with *diabetes*, and had a usual medical attendant, who had attended him on sundry occasions and treated him for serious diseases.

The plaintiff, in reply, alleged that the application referred to in the answer was not written by said Alford, but by a certain agent of the defendant, who induced Alford to make it, and that the answers were written in said application by said agent to suit himself, and not as said Alford made them, and that the answers made by Alford were true; that Alford's signatures were not attached to the application as a verification of the answers therein, but at the request of said agent were signed and affixed to said paper to identify the same, and the person to whose use and benefit the policy was to issue, and that the original paper, of which a copy purports to be attached to said policy, is not said Alford's act and deed.

The case was tried before a jury.

The plaintiff introduced evidence at the trial tending to show that said Alford did not give the answers contained in said application, but, when asked if he had any disease of the kidneys, answered that he had had *diabetes*; and when asked as to his usual medical attendant, etc., had answered truthfully, and referred the agent who propounded the questions and wrote down the answers to his family physician, and told him to inquire of said physician, and that he would give him full particulars, and had signed the application supposing that his answers had been correctly reduced to writing.

Carr & Reynolds, for plaintiff.

Overall, Judson & Tutt, for defendant.

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TREAT, *District Judge (charging jury)*.— Contracts of insurance are contracts of public good faith. In other words, a party applying to an insurance company must state truthfully the matters on which the risk is based, so that the company may determine whether it will undertake the risk or not. On the other hand, the company, when it does take a risk on the facts correctly stated to it, if a loss occurs, must pay the loss. You will, therefore, consider, in all controversies between an insurance company and the party assured, that you are dealing honestly and fairly, according to the terms of these contracts. In these insurance contracts, as in all other contracts, persons are held to the obligations which they assume. In regard to that, whether it be a corporation on the one side, or a private individual or natural person on the other, the same rule must prevail. But when a supposed contract has been entered into between two parties, whether natural persons or corporations, and there is an element connected therewith, as of fraud, whether the contract should not be held either obligatory originally, or be avoided,—fraudulent questions entering into it,—juries have to determine that matter. Therefore, I take it for granted, in this case, you will deal between this corporation on the one side, and the representatives of the deceased on the other, just as if the contract were between two natural persons.

It having been admitted that the deceased died of *diabetes*, and that he had, at the date of the application, said disease, and had previously had said disease, and it being also admitted that he had a usual medical attendant, who had treated the deceased for said disease, and that his answers to the questions were material to the risk, there is for the consideration of the jury the determination only of this essential fact, the burden of proving which is on the plaintiff, viz.: whether the deceased (Alford) ever answered the questions presented written down in the application, which answers, as so written down, are admitted to be false and material.

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Every one who signs a document, like the application in this case, is presumed to know what he signed, and is to be held thereto, unless he can show, by competent evidence, that he answered the questions truthfully, and not as written down, and signed the application believing that the truthful answers made by him were correctly written, and contained in the application by him signed. Therefore the plaintiff is not entitled to recover, unless he has proved that the signature of Alford to the application was obtained from him on the belief that he (Alford) was signing a written statement which contained the truthful answers which he had really made to the question put to him, which answers were falsely written down unknown to him (Alford) when he attached his signature to the application.

If the plaintiff recovers, the verdict must be for \$10,000, with interest at the rate of six per cent. from the date of proof submitted, say from February 10, 1881.

If, therefore, the signature of Alford was obtained, as stated, without knowledge on his part that his answers were falsely recorded, the plaintiff is entitled to recover; but, on the other hand, if his signature was not thus fraudulently procured, the verdict must be for the defendant.

Verdict for plaintiff for \$10,000, with interest at the rate of six per cent. from February 10, 1881.

Defendant moved for a new trial upon the following among other grounds: That under the stipulations of the contract between the parties, it was erroneous to admit testimony of declarations made to the soliciting agent; that in the absence of evidence of fraud or imposition, it was error to submit to the jury the question whether the application was knowingly signed; that the court erred in refusing to charge that plaintiff's testator, by accepting the policy sued on, with copy of the application signed by him as part thereof, was not bound by the statements and answers contained in it; that there was error in excluding testimony offered by defendant.

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Upon which motion for a new trial the court delivered the following opinion:

TREAT, *District Judge*.—As heretofore stated, the pleadings led the court to make many erroneous rulings concerning the admission and rejection of testimony. An effort was made in the instructions, by the consent of the plaintiff, to avoid such errors, the rulings having been mainly against the plaintiff. But the defendant is before the court to take advantage of erroneous rulings, which he has a right to do. Hence this court, admitting its errors during the trial, must grant the motion.

The more important propositions submitted by the defendant the court does not now pass upon, although its impressions with respect thereto are strongly against the defendant. If a foreign corporation transacts business in Missouri by virtue of its laws, can it, by clauses inserted in its policy, take itself out of the force of Missouri laws? It is not proper to discuss that question now. But for the errors committed as to the rejection and admission of testimony objected to, the court would so rule as to compel a decision on the main question, viz., whether a foreign insurance company doing business in Missouri can escape the consequences of the Missouri statutes by any terms or contrivances, written or oral, for that purpose. It is to be regretted that this case must be tried again, and it is to be desired that before the next trial the pleadings, by proper motion, may be made to raise questions of fact alone, so that the court may be duly advised as to what facts are committed to the jury, reserving to the court the legal propositions arising

Motion for new trial is sustained.

Carr & Reynolds, for plaintiff.

Overall, Judson & Tutt, for defendant.

Brownsville Manuf'g Co. v. Lockwood.

UNITED STATES v. TIERNAY.

(Eastern District of Missouri. September, 1881.)

1. INDICTMENT — INFORMATION — TRANSFER FROM DISTRICT TO CIRCUIT COURT — STATUTE CONSTRUED.— A criminal proceeding commenced in the district court cannot be remitted for trial to the circuit court under the provisions of section 1037 of the Revised Statutes of the United States.

McCRARY, *Circuit Judge*.— This is a criminal information, filed in the district court, charging the defendant with a crime against the elective franchises (R. S. sec. 5511), and it is prosecuted under an information and by the authority conferred by section 1022 of the Revised Statutes. It was remitted to this court from the district court under the provisions of section 1037 of the Revised Statutes, which by its terms authorizes the district court to remit to the next session of the circuit court of the same district any *indictment* pending in said district court. Defendant moves to remand the case upon the ground that the statute did not authorize the district court to send it here, this not being an indictment. The motion must be sustained. We are not at liberty to presume that the term indictment in section 1037 of the Revised Statutes was intended to include an information. We cannot enlarge or change the plain meaning of the language of a criminal statute. It must be strictly construed.

William H. Bliss, for United States.

Marshall & Barclay, for defendant.

BROWNSVILLE MANUF'G Co. v. LOCKWOOD.*(Eastern District of Missouri. April, 1882.)*

1. DEBTOR AND CREDITOR — COMPOSITION DEED.— A composition deed to which some of the signatures have been procured by a payment of more than their *pro rata* shares to the signers is invalid.

Motion for a new trial.

This was a suit for the price of goods sold and delivered.

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The defendant alleged in his answer that plaintiff had signed a composition deed whereby it agreed to accept fifty cents on the dollar in full satisfaction of its claim, and that pursuant to the terms of said deed, fifty per cent. of its demand had been paid. Plaintiff replied that certain creditors had been paid in full who had refused to sign said deed, and that certain others who had signed had been paid more than fifty per cent. of the amount due them. Judgment for plaintiff.

Silas B. Jones, for plaintiff.

Pattison & Crane, for defendant.

TREAT, *District Judge*.—There is only one proposition in this case, viz.: Whether the defendant's composition deed is valid against this plaintiff. Without reviewing the evidence, or the legal propositions underlying such inquiries, the court finds that the signatures of some of the creditors to the composition deed were obtained by giving to them more than their *pro rata* under the deed, with the view of securing their signatures, and that thereby the equality on which the validity of such deeds must rest was not observed. Hence said composition deed is invalid, and the plaintiff is entitled to recover what remains due to him.

WIGGINS' FERRY Co. v. CHICAGO & A. R. Co.

(*Eastern District of Missouri. April, 1882.*)

1. CONSTITUTIONAL LAW — JUDGMENTS — ARTICLE 4, § 1, OF THE CONSTITUTION OF THE UNITED STATES.—The provision of the federal constitution that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," only relates to the validity and effect of judgments rendered in one state when proved in another.
2. SAME.—The duty of the courts of one state to follow the decisions of another, upon questions arising upon the construction of the statutes of the latter, is a duty resting upon comity, and is not imposed by the federal constitution.

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8. **SAME — REMOVAL OF CAUSES.**— Where two corporations, organized under the laws of Illinois, executed a contract to be performed in that state, which, according to the decisions of the supreme court of the state, they had no power to make, and which, according to said decisions, was void, and one of the contracting parties brought suit in a court of the state of Missouri, the supreme court of which had previously, in a suit between the same parties, held the contract valid, *held*, that the cause could not be removed to this court because of said failure of the supreme court of Missouri to follow the decisions of the supreme court of Illinois, the case not resting on a federal law.

Suit for a breach of contract. The case was removed to this court from the circuit court of the city of St. Louis at the instance of the defendant. It alleges, in its petition for removal, that said contract is void under the laws of Illinois and according to the decisions of the supreme court of that state, but that in a previous suit between the same parties said contract has been held valid by the supreme court of Missouri. The other material facts are sufficiently stated in the opinion of the court.

Glover & Shepley, for plaintiff.

C. Beckwith and *C. H. Krum*, for defendant.

McCrary, Circuit Judge.— Motion to remand to the state court from which the suit was removed. The plaintiff and defendant are respectively Illinois corporations, and hence, on the ground of citizenship, the case is not removable. It is contended, however, that, as plaintiff pleads by way of estoppel the determination by the Missouri courts of the main question in controversy, which, it is contended, is different from the decisions of the Illinois supreme court concerning the powers and duties of the corporate parties herein, a federal question is presented within the meaning of the federal statutes. Ordinarily the federal courts follow the decisions of the state courts in the construction of their constitutions and statutes; but when state courts, not observing such comity, put different constructions upon a con-

tract between local corporations, does that fact make the case one resting upon federal law?

It is said the Missouri supreme court has not given "full faith and credit" to the Illinois constitution, statutes and decisions; and consequently the suit in question involves *in limine* the question as to faith and credit to be given to Illinois decisions, etc. If the point is well taken, all conflicts of decisions as to contracts within the different jurisdictions can be drawn into federal courts. It does not follow that when state courts differ, as suggested, a federal question becomes the main one in the suit, whereby the federal court is to oust a state court from its jurisdiction, and proceed to determine authoritatively which of the respective decisions is correct. It is true that federal courts follow the interpretation, by courts of last resort of the respective states, of their constitutions, and generally of their statutes and contracts made thereunder. It is contended in this case that the supreme court of Missouri did not follow that rule, and therefore "full faith and credit" not having been given in Missouri "to the public acts, records and judicial proceedings" of the state of Illinois, there is ground for removal, because the case is one "arising under the constitution and laws of the United States;" nor is it essential to the decision thereof that the United States constitution or laws should be primarily determined. In the light of the many federal decisions on this question, this case is not one within the purview of federal jurisdiction, unless the point stated as to the differences between the Missouri and Illinois courts brings it within the rule as to removals. It is admitted, apparently at least, that the sole ground of removal rests upon the alleged difference of opinion between the two state courts; but that difference does not, in the opinion of this court, bring the case within the rule governing removals.

Counsel for defendant have, we think, mistaken the meaning of the constitutional provision upon which they rely. It is a provision which relates only to the validity and effect of a judgment rendered in one state when proved in another. The

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colonies had been deemed foreign to each other, and the general rule of the common law, recognized both in England and America, was that foreign judgments were only *prima facie* evidence of the rights which they purported to have settled.

The framers of the constitution may have apprehended that for many purposes the states of the Union about to be formed might be held to be foreign to each other. There was reason to fear that, if left to themselves, the states, or some of them, might assert the right to inquire into the merits of controversies once settled by judgments in the courts of sister states. The evils which would have resulted from a general system of re-examination of the judicial proceedings of other states are apparent, and for reasons such as these, says Judge Story, the framers of the constitution "intended to give, not only faith and credit to the public acts, records and judicial proceedings of each of the states, such as belonged to those of all foreign nations and tribunals, but to give to them *full* faith and credit; that is, to attribute to them positive and absolute verity, so that they cannot be contradicted, or the truth of them denied, any more than in the state where they originated." 2 Story Const. (3d ed.) § 1310.

This, however, is the full scope of the constitutional provision. It relates only to the conclusiveness of such judgments as between the parties to them and their privies. It does not require that judgments in one state shall be followed by the courts of other states as matter of authority in other similar cases. The constitution does not deal with the question of the effect of such judgments as precedents, nor with the opinions of the courts rendering them. It does not require the courts of one state to follow those of another upon any question, whether upon the construction of local statutes or otherwise. There may, it is true, be cases in which a state law or decision has entered into and become a part of a contract in such a way, as that a change of the law or a reversal of the decision would impair its obligation; but in those cases the federal question would arise under a different provision

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of the constitution. The duty of the courts of one state to follow those of another, upon questions arising upon the construction of the statutes of the latter, is a duty resting alone upon *comity*, and not one imposed by the federal constitution. These are the views of this court, but the points presented are new and important, and call for authoritative determination. The motion to remand is, therefore, sustained, and the defendant may take an exception.

TREAT, *District Judge*, concurred.

NOTE.¹—The terms “faith” and “credit,” as used in article 4, § 1, of the constitution of the United States, point to the attributes and qualities which judicial proceedings and records shall have as evidence (*McElmoyle v. Cohen*, 13 Pet. 312; *Carter v. Bennett*, 6 Fla. 214; *Joice v. Scales*, 18 Ga. 725; *Brengle v. McClellan*, 7 Gill & J. 434; *Shelton v. Johnson*, 4 Sneed, 672); and the object of the section is to declare that full faith and credit shall be given to such, the manner of authenticating the same, and their effect when properly authenticated. *McGraw v. Watrous*, 16 T. 509. The object of this clause was to preclude judgments from being disregarded in other states, when a proper tribunal, with competent jurisdiction, had rendered them (*People v. Dawell*, 25 Mich. 247); but only so far as they have jurisdiction (*D'Arcy v. Ketchum*, 11 How. 165), the record being subject to contradiction as to facts necessary to give jurisdiction (*Thompson v. Whitman*, 18 Wall. 457; *Pennywit v. Foote*, 27 Ohio St. 600); as where judgment was rendered against a citizen of another state not served with process, and who did not voluntarily appear. *D'Arcy v. Ketchum*, 11 How. 165. The constitution has effected no change in the nature of a judgment (*McElmoyle v. Cohen*, 13 Pet. 312); it simply places judgments in another state on a different footing from what are commonly called foreign judgments, as to their force and effect. *Olden v. Hallett*, 2 South. N. J. 466; *Gibbons v. Livingston*, 6 N. J. L. 236. The judgment of a state court has the same validity, credit and effect in any state that it has in the state where rendered (*Westerwelt v. Lewis*, 2 McLean, 511; *Warren Manufacturing Co. v. Aetna Ins. Co.* 2 Paine, 502; *Hampton v. McConnel*, 3 Wheat. 234; *Mayhew v. Thatcher*, 6 Wheat. 129; *Sarchet v. The Davis, Crabbe*, 185; *Houston v. Dunn*, 13 Tex. 476; *Benton v. Burgot*, 10 Serg. & R. 242; *Green v. Sarmiento*, 3 Wash. C. C. 17; *Bank of Ala. v. Dalton*, 9 How. 522; *Mills v. Duryee*, 7 Cranch, 484; *Whitwell v. Barbier*, 7 Cal. 54), and where jurisdiction attaches it is conclusive as to its merits (*McElmoyle v. Cohen*, 13 Pet. 312; *Christmas v. Russell*, 5 Wall. 302; *U. S. Bank v. Merchants' Bank*, 7 Gill, 430; *Bissell v. Briggs*, 9

¹ From *Federal Reporter*.

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Mass. 462; *Ingram v. Drinkard*, 14 Tex. 352); but no greater effect can be given than is given in the state where rendered. *Public Works v. Columbia College*, 17 Wall. 529; *Suydam v. Barber*, 18 N. Y. 468.

To the end in view, congress has full power to legislate as to the effect of judicial proceedings in the courts of the states and territories. *Hughes v. Davis*, 8 Md. 271; *Duvall v. Fearson*, 18 Md. 502. But see *Adams v. Way*, 33 Conn. 419; *Haggin v. Squires*, 2 Bibb, 334; *Seton v. Hanham*, R. M. Charl. 374. The authenticity of a judgment and its effect depend upon the law made in pursuance of the constitution (*McElmoyle v. Cohen*, 13 Pet. 312), which declares that congress may mark out the effect and define the general power given (*Curtis v. Gibbs*, 1 Pen. N. J. 379), and to give a conclusive effect to judgments in state courts. *Mills v. Duryee*, 7 Cranch. 481; *McElmoyle v. Cohen*, 13 Pet. 312; *Warren Manuf'g Co. v. Aetna Ins. Co.* 2 Paine, 501; *Green v. Sarmiento*, Pet. C. C. 74; S. C. 3 Wash. C. C. 17. The constitution does not confer the power to give to a judgment all the legal properties, rights and attributes to which it is entitled by the laws of the state where rendered (*Brengle v. McClellan*, 7 Gill & J. 431), nor that the effects and consequences of a litigation shall follow it into other states (*Shelton v. Johnson*, 4 Sneed, 672), nor to extend the local jurisdiction or the operation of a local decree. *Bowen v. Johnson*, 5 R. I. 112.

As to the right of removal, it is not sufficient that the constitution and laws of the United States are only incidentally drawn in question (*State v. Bowen*, 8 Rich. (N. S.) 382); as where a party claims title under an act of congress. *Hoadley v. San Francisco*, 94 U. S. 4; S. C. 3 Sawy. 553; *Trafton v. Nougues*, 4 Sawy. 178. So a national bank cannot remove merely because it derives its existence under a law of the United States. *Pettilon v. Noble*, 7 Biss. 449; *Wilder v. Union Nat. Bank*, 15 Chic. L. N. 75. It is only where the correct decision of a case depends upon the construction of either, or where it involves any question under either, or under a treaty, that the right attaches (*Gold W. & W. Co. v. Keyes*, 96 U. S. 199; *Connor v. Scott*, 4 Dill. 242); or where the decision involves a federal question. *Connor v. Scott*, 4 Dill. 242.

 HAYWARD and another v. CITY OF St. LOUIS and another.

(Eastern District of Missouri. April, 1883.)

1. LETTERS PATENT — EXTENDED TERM — STATUTE OF LIMITATIONS. —

Where suit was brought for an infringement of reissued letters patent, reissued in 1868, and a plea of the statute of limitations was interposed, *held*, (1) that the state statute did not apply; (2) that section 55 of the act of July 8, 1870, had not been repealed, so as to relieve either party to the case from the federal limitation of six years after the expiration of the extended term.

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Demurrer to the plea of the statute of limitations. This is a suit for an infringement of letters patent of the United States, originally granted in the year 1854, and reissued for an extended term of seven years in 1868. The petition alleges that the defendants "infringed upon the exclusive rights and privileges intended to be secured to plaintiffs by the reissued letters patent," but does not state when said rights and privileges were infringed. The board of president and directors of the St. Louis public schools (one of the defendants) filed a separate answer containing — *First*, a general denial; and *second*, a plea that the alleged cause of action set forth in the petition did not accrue to the plaintiffs within five years next before the commencement of the suit.

D. M. Spier, Jr., and O. B. Sansum, for plaintiff.

Leo Rassieur, for the board of president and directors of the St. Louis public schools.

TREAT, *District Judge*.— The defendant pleads the statute of the state which requires suit to be brought within five years from date of cause of action accrued.

The state statute does not apply, inasmuch as congress has fixed the date in patent cases whereof the federal government has exclusive jurisdiction. It is contended that the congressional limitation has been repealed. If so, no limitation would prevail, except as by the state statute. Without repeating what has been so ably considered by other United States courts, it is held that the federal statute in this respect has not been repealed so as to relieve either of the parties to this case from the federal limitation of six years. The plea, therefore, is bad, but the petition is very indefinite.

As the case is presented, the defendants, if they desire to set up that the claim is barred by the federal statute, must aver the period of six instead of five years.

Demurrer is sustained.

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BATES *et al.* v. DAYS.

(*Western District of Missouri. April, 1882.*)

1. ATTACHMENT—EFFECT OF THE ADOPTION OF STATE STATUTE BY FEDERAL COURTS.—By the adoption of the state attachment laws as rules for the guidance of the federal courts, congress did not intend to limit the constitutional right of non-residents to resort to those courts for the determination of their controversies with citizens of other states.
2. SAME—SAME—STATUTE CONSTRUED.—Held accordingly, that where there were several attachments against the property of the same debtor, some in the state and others in the federal court, it was not the right of the plaintiffs in the former, under section 915 of the Revised Statutes of the United States, to have the latter transferred to the state court, so that all may be determined in the same jurisdiction.

Motion to transfer the case to a state court. The facts sufficiently appear in the opinion.

Dysart & Foster, for the motion.

W. D. Carlisle and *Botsford & Williams*, *contra*.

KREKEL, *District Judge*.—It appears that plaintiffs, being non-residents of the state of Missouri, sued out an attachment against the defendant, who is a resident of this state, and seized a stock of goods, now in the hands of the United States marshal, who is proceeding to sell them under orders of this court.

- Soon after the seizure of the goods by the foreign creditors, certain Missouri creditors of the defendant in the attachment sued out in the local state court writs of attachment, and are aiming under them to reach such of the proceeds as may not be necessary to satisfy the claims of the foreign creditors. In order to accomplish this more successfully, they come here and file their motion, asking that the case of the non-resident creditors be transferred by this court to the Macon county circuit court, the state tribunal in which the

resident creditors have instituted their proceedings. The motion is sought to be maintained under section 915 of the United States statute, which provides that in all common law cases the plaintiff shall be entitled to similar remedies by attachment or other process against the property of the defendant which are now provided under the laws of the state in which such court is held for the courts thereof, and providing further for the adoption by circuit and district courts of the United States of the attachment laws of the states, which adoption has taken place in Missouri. It is claimed, in support of the motion, that by these provisions congress has not only adopted the attachment laws of the states, but has made them obligatory to the extent of controlling the forum in which a party under given conditions, such as are presented in this case, is bound, on demand, to permit his case to be transferred to the state court; in other words, to relegate to such court the determination of controversies between citizens of different states. It will be observed that the provisions of the United States statutes regarding attachments in adopting the laws of the states, speaks of plaintiff's remedies against the property of the defendant, and makes no allusion to anything pertaining to the jurisdiction of courts. The right to sue and have his case determined in the federal courts is secured to a non-resident by constitutional provision, extending the judicial power of the courts of the United States to controversies between citizens of different states, and by acts of congress passed under the power thereby granted. It cannot be supposed that congress, by adopting the state attachment laws as a rule for the guidance of its courts in a particular class of cases, thereby intended to limit or abrogate the constitutional right of non-residents to resort to its courts for the determination of their controversies with citizens of other states, for if the cases, when in court, must be transferred to the local states courts on demand, the constitutional right is of no avail. Two cases have been cited in support of the motion,

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and they have been carefully examined. The first is in the *Garden City Co. v. Smith*, 1 Dillon. The question there decided is whether a motion passed upon by the state court, before removal, could be again entertained in the court to which the case had been removed, and the conclusion arrived at is, that it rested within the sound discretion of the court under the special circumstances of the particular case.

Lehman v. Berdin, 5 Dillon, the second case relied on, decides that federal courts will give effect to state attachment laws, and will be guided in their construction by the views of the supreme court of the state. The case further determines that by giving bond, thereby obtaining the release of property attached, defendant does not waive his right to put in issue the truth of the affidavit upon which the attachment issued; in other words, file plea in abatement. It is not seen how these cases apply to the matter in controversy. The head-note of the last case is calculated to mislead as to the points decided in the case.

Passing from the right of non-residents to sue and have their controversies with citizens of other states determined in the federal courts, let us inquire what is the law of the state of Missouri regarding attachments, as affecting such in the federal courts. Section 447 of the Missouri statutes of 1879 provides that when the same property is attached in several actions by different plaintiffs against the same defendant, the court may settle all controversies, . . . including the good faith, force and effect of the different attachments. . . . If writs issue from different courts of co-ordinate jurisdiction, such controversies shall be determined by that court out of which the first writ of attachment was issued; in order where to the cases originating in other courts shall be transferred to it and shall thenceforth be there heard, tried and determined in all their parts as if they had been instituted therein. If any such controversies arise between a plaintiff in an action instituted in a court of general jurisdiction, and a plaintiff in an action instituted in a

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court of limited jurisdiction, the matter shall be determined in the former court, to which the action commenced in the latter shall be transferred.

Regarding the provisions here quoted, it may be remarked that there is nothing about them indicating that the vesting of any other than the ordinary and usual jurisdiction was intended by the legislature. Had such an important matter as the granting of jurisdiction of cases coming from the federal to the state courts been contemplated, we would be apt to find some appropriate provision in this or some other law of the state. Again, though the attachment laws of the states be fully adopted by congress, no vesting of jurisdiction in the state courts to try causes coming from the federal courts could be inferred from them, for congress is not the source of such powers, except to a very limited extent. But the want of power in the state courts to try causes coming from the federal courts here suggested is sought to be overcome by treating the federal courts as courts of limited jurisdiction, and applying the language of Missouri attachment law, when speaking of courts of limited jurisdiction, to them. A careful examination of the Missouri statute referred to shows beyond a doubt that the legislature, in speaking of courts of limited jurisdiction, is speaking of its own courts only, and not of courts independent of it and with assigned jurisdiction. We may well assume that the framers of the Missouri law were acquainted with the allotment of judicial powers under our system. To give the words "limited jurisdiction" used in the Missouri statute any application other than to their own courts, would bring about a conflict of jurisdiction such as is sought to be avoided rather than be brought about. It is argued that the construction put upon the Missouri attachment law by the supporters of the motion must be correct, otherwise home creditors, in a case like the one under consideration, would be remediless or at great disadvantage, for foreign creditors might attach all the property of a resident debtor, and though more than sufficient to satisfy the

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claim, yet home creditors could not reach the overplus. Without undertaking to suggest the remedy, it may be said that such is not the law, for the courts of the United States are open to home creditors when their rights are affected in dealing with property, and their citizenship does not deprive them of such rights or deny them proper and seasonable remedies.

The conclusions arrived at are that non-resident citizens cannot be deprived of their right to have controversies with citizens of other states determined in the federal courts, and that this court cannot relinquish its jurisdiction by transferring the case to the state circuit court of Macon county. The motion is therefore denied. *Campbell & Emerson v. Emerson & Moore*, 2 McLean, 30; *Greenwood et al. v. Rector*, Hempst. Cir. Ct. Rep. 708.

THE UNITED STATES v. JAMESON *et al.*

(*District of Nebraska. January, 1882.*)

1. OFFICIAL BONDS — LIABILITY OF SURETIES FOR OFFICERS HOLDING OVER.— The sureties on the official bond of a surveyor general or register and receiver of the United States, whether appointed in California or elsewhere, are liable for a default of their principal occurring after the expiration of the principal's term of office and before his successor is appointed and qualified.

Action upon the official bond of S. E. Jameson, as register and receiver of a land office in Nebraska. Defense by the sureties that the default occurred after the expiration of the original term of office of said Jameson. The fact appeared that the default occurred while Jameson was holding over under the statute referred to in the opinion, and before a successor had been appointed.

Lambertson, United States Attorney, for the government.

J. L. Webster, for defendant.

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FOSTER, *District Judge*.—The 10th section of the act of March 3, 1853, contained a provisional enlargement or extension of the tenure of office of certain officers, and continued the liability of the sureties on their official bonds during said term. The question at issue is whether Jameson, the principal defendant, comes within the scope of that provision.

Let us first observe what officers were to be appointed in virtue of that act. They were a surveyor general and register and receiver of the land office for the state of California, and certain other registers and receivers in said state, in the discretion of the president. Secs. 1 and 5.

Now the 10th section enlarges the official term of these officers and *also every other like officer* of the United States, *i. e.*, every other *surveyor general, register and receiver* of the United States, until their successors were commissioned, and holds their bondsmen liable for their official acts during such time. It would be a strained construction of the words used, to say that they meant every other like officer in the state of California.

At that time, it is fair to presume, there were no other like officers in California, and no provision for any except such as this act provided for.

The act says, *also every other* like officer of the United States.

It is broad and sweeping in its terms, and I have no doubt was intended to apply to every other like officer in the United States.

The recitation of this section, in the bond, indicates that the contracting parties so understood it at the time. The demurrer must be overruled, and defendants may have twenty days to answer

DUNDY, *District Judge*, being interested, took no part in this case.

Freeney et al. v. First National Bank of Plattsmouth et al.

FREENEY *et al.* v. FIRST NATIONAL BANK OF PLATTSMOUTH *et al.*

(District of Nebraska. May, 1882.)

1. **PROBATE OF WILL — JURISDICTION — STATUTE OF NEBRASKA.**— It is now the settled law of Nebraska that the county or probate court has original and exclusive jurisdiction in the probate of a will, and that its judgment and order in such a matter is final and conclusive unless appealed from.
2. **SAME — SAME — DISTRIBUTION OF AN ESTATE.**— While an estate is in the hands of the proper probate court for the purposes of administration, no other court can interfere with it for the purpose of distribution.
3. **INJUNCTION TO RESTRAIN PROBATE COURT.**— This court will not restrain an executor, appointed by a probate court in Nebraska, from attempting to take possession of the estate, nor will it restrain the probate court itself from proceeding.
4. **JURISDICTION — STATE AND FEDERAL COURTS.**— Where there is an ample and unquestioned remedy in the state court, while as to many of the matters complained of this court is without jurisdiction, and as to others the question of jurisdiction is doubtful, the court will refuse to proceed.

This cause has been heard upon a plea to the jurisdiction. The original bill was filed in the district court of Cass county, Nebraska, and its averments, so far as it is necessary to state them, are in substance as follows:

1. That one John Fallon died in Cass county, Nebraska, on the twentieth day of November, 1879, leaving a large amount of personal property as well as valuable real estate.

2. That complainants (except John O'Rourke) are near of kin and heirs of said John Fallon; and that said O'Rourke was intrusted with the care, management and possession of all the property of said deceased, by him, three days prior to his death.

3. That notwithstanding the said John Fallon died intestate, the defendant Alexander Campbell, fraudulently combining with other persons, did, on the seventh of January, 1881, present to the probate court of Cass county a certain

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instrument, claiming the same to be the nuncupative will of said John Fallon, deceased.

4. That on the twenty-fifth day of May, 1881, through fraud, etc., said pretended will was admitted to probate.

5. That at that time some of the complainants were residents of Great Britain, and no notice was given.

6. That defendant Campbell has been appointed executor under said pretended will so probated, and is seeking now to gain possession of the goods and effects of said deceased.

7. That three days prior to his death said deceased delivered to the complainant O'Rourke, moneys and evidences of indebtedness amounting to nearly \$9,000, in trust for his co-plaintiffs, and requested said O'Rourke to preserve, care for and deliver the same to them, when they should be found, and that said O'Rourke deposited the same with the First National Bank of Plattsmouth, and that said Campbell is attempting to secure possession of the same, and the bank is about to pay the same over to him.

9. That all claims against the deceased have been paid

10. That some of the complainants prayed an appeal from the order admitting said will to probate, which was refused.

The prayer is that the pretended will be set aside, and that complainants be permitted to take charge, custody and control of said estate, and that on final hearing a distribution of said estate be had according to law; also for an injunction against the bank to restrain it from paying the money in its hands over to the executor, Campbell, and also to restrain said Campbell and the probate judge from in any way interfering with said estate.

After the removal of the cause into this court, a supplemental bill was filed, by which it is further averred that since the filing of the original bill, and since the allowance of an injunction thereon, a special executor has been appointed by the probate court to take charge temporarily of said estate, and that he is seeking to secure such possession.

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It is alleged that this latter proceeding was fraudulent and void and for the purpose of depriving this court of its rightful jurisdiction.

The special executor is made a party defendant, and the prayer is that he be enjoined from taking possession of said estate or otherwise interfering therewith, and for decree declaring that the action of said probate court in appointing said special executor was and is null and void.

M. A. Hartigan, Webster & Gaylord, for complainant.

J. C. Cowin, for respondents.

McCRARY, *Circuit Judge*.—The difficulties in the way of maintaining the jurisdiction of this court are the following:

1. It is now the settled law of Nebraska, that the county or probate court has original and exclusive jurisdiction in the probate of a will, and that its judgment and order in such a matter is final and conclusive unless appealed from. *Loosemore v. Smith*, 11 N. W. Rep. 493.

It follows that we have no power to grant any relief except such as might be granted upon the assumption that the will is valid.

2. The statutes of Nebraska not only give the courts of probate exclusive jurisdiction of the probate of wills, but also of the administration of the estates of deceased persons. Compiled Statutes of Nebraska, p. 205, sec. 3. Thus it appears that we can take no step that would interfere with the administration of the estate by the probate court. It is said, however, that courts of chancery have a general jurisdiction to decree a distribution of an estate among the persons entitled to share therein. No doubt this is true as a general proposition, but we think it must also be true, that, while the estate is in the hands of the proper probate court for the purposes of administration, no other court can interfere with it for the purpose of distribution. Indeed it is not easy to say exactly where the power of administration ceases and

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that of distribution commences, and the better opinion probably is that the power of the probate court in Nebraska extends to the distribution of the estate. It is certain that the personalty passes into the possession of the executor, and that he is to dispose of it, under the orders of the probate court. Does it not necessarily follow that the court must order him to distribute it after the payment of the debts and expenses of administration?

3. This court is asked to enjoin the executor appointed by the probate court from proceeding in the discharge of his duties and from attempting to take possession of the estate, and also to enjoin the probate court itself from proceeding further. Manifestly we can do neither. The probate court has jurisdiction, and therefore the right to proceed. It is in such cases not simply a court of co-ordinate jurisdiction with this court (which would be sufficient), but it is a court possessing, as we have seen, exclusive jurisdiction. By general principles, as well as under the express provisions of an act of congress (R. S. sec. 720), we are forbidden to enjoin its proceedings.

4. When this case was first brought to our attention, we were inclined to think the jurisdiction might be maintained upon the ground that the state district court from which it was removed had jurisdiction, and that therefore, under the removal acts, this court acquired and could exercise it. But it is conceded that since the removal, by a statute of the state, the jurisdiction of the district court of the state has been taken away. Compiled Statutes, title "Decedents," sec. 143. If the jurisdiction of this court depends upon that of the court from which this cause was removed, does it not fall when the jurisdiction of the latter is taken away? It is well settled that the legislature may take away the jurisdiction of a court resting upon state laws in a particular suit after it has been commenced.

5. Counsel insist that the property in question is not assets of the estate, and therefore not within the control of the

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state court. If the will is valid, the personal property belonging to the deceased at the time of his death is undoubtedly assets to be administered under it, and the right to administer clearly involves the right to determine what estate is to be administered.

If this court should assume to control the probate in the decision of the question whether the particular property here in question is assets which passed by the will, it would assume the right to control the judgment and action of that court in a matter within its jurisdiction.

This court will always hesitate to take jurisdiction of a case in which it cannot grant full relief, or in which it may be brought into unnecessary conflict with the courts of the state.

While maintaining with firmness the jurisdiction conferred upon us by law, we shall never provoke conflicts by any encroachment upon the rights and powers of co-ordinate tribunals.

Under the statutes of the state as they now stand, the complainants have an ample remedy by commencing their proceedings in the probate court, and if unsuccessful there, by prosecuting their appeal; while so far as this court is concerned, it has clearly no jurisdiction over most of the matters complained of in the bill and amended bill, and as to the others the question of jurisdiction is, to say the least, extremely doubtful. Under these circumstances, the plea to the jurisdiction will be sustained, and it is so ordered.

DUNDY, *District Judge*, concurs.

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THE NORTHERN PACIFIC RAILROAD COMPANY v. KINDRED,
POWER *et al.* (Four cases.)

(*District of Minnesota. October, 1881.*)

1. **BILL IN EQUITY TO SET ASIDE FRAUDULENT CONTRACT — LACHES.**— A bill brought to set aside as fraudulent certain transactions and contracts made by complainants in ignorance of the fraud, and which alleges that some of the fraudulent acts “were not discovered until within a few weeks last past,” and others “within the three months last past,” does not affirmatively show that complainant has been guilty of laches.
2. **SAME — SAME — BURDEN OF PROOF.**— It is true that even within this short period of time, the complainant, by its acts or declarations, may have confirmed the contract, but if so, the fact must be pleaded as a defense and established by proof. Equity will not presume a ratification by the defrauded party if he files his bill with reasonable promptness.
3. **PRINCIPAL AND AGENT — FRAUD OF AGENT — RETURN OF CONSIDERATION.**— Where a principal employs an agent to sell lands for him, and authorizes him to make contracts in his (the principal's) name, and the agent fraudulently buys some of the land in the name of a third party, and the principal executes a conveyance and receives certain bonds as the consideration, *held*, that the principal, upon being advised of the fraud, may repudiate the contracts upon returning to the agent the sum paid by him for the stock without any profits thereon. An agent will not be permitted to make any profit out of transactions connected with his agency, and if he be an agent to sell property, he must not be allowed to purchase it.
4. **SAME — PROFITS BELONG TO PRINCIPAL.**— If an agent shall make any profits in the course of his agency by any concealed arrangement, either in buying or selling, or other transactions on account of his principal, such profits will belong exclusively to the latter.
5. **SAME — SAME — RULE FOR ACCOUNTING AS TO PROFITS.**— Where an agent has fraudulently made profits out of his agency at the expense of his principal, he shall account for all such profits, and shall be allowed only the actual value of whatever he turns over to his principal; and if he turns over property purchased in the course of his agency, what he paid for it shall be considered its value.
6. **BILL IN EQUITY — PARTIES.**— The persons who are used as instruments to take the title for the agent, in such a case, and to convey it as he may direct, and who have conveyed as directed by him, are not necessary parties unless some relief is sought as against them.
7. **SAME — MULTIFARIOUSNESS.**— A bill which charges a fraudulent

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combination among several persons to commit a fraud, and specifies numerous separate transactions all entered into in pursuance of the general fraudulent scheme, is not multifarious.

8. **SAME — GENERAL ALLEGATIONS OF FRAUD.**— Fraud must be specifically alleged, but general allegations introduced as a foundation for a future application to amend upon obtaining more specific information, are not demurrable.

These are bills in equity, brought to recover the profits alleged to have been realized by the respondents Power and Kindred upon the sale of certain lands, which were disposed of by them, as is alleged, for their own use and benefit, while they were acting as the agents of the complainant for the purpose of selling the same, and therefore forbidden to have any interest adverse to complainant.

The respondents demurred to the bill upon grounds stated in the opinion, which also sets forth the substance of the allegations demurred to.

W. T. Clough, for complainant.

C. K. Davis, for respondents.

McCABY, Circuit Judge.— These cases are before us on demurrers to the bills. We will consider the several questions discussed by counsel in the order in which they have been stated in the argument.

1. It is insisted that it appears by the bills that complainant has been guilty of laches in the premises, and has for so long a time acquiesced in the contracts, acts, doings and omissions complained of, with full knowledge thereof, as to bar it from the relief prayed. To support this proposition the counsel for respondents invokes the doctrine that where a contract is obtained by fraud, and the party defrauded desires to rescind on that ground, he must, upon the discovery of the fraud, at once announce his purpose and adhere to it. *Grymes v. Sanders*, 93 U. S. 62, and cases there cited.

We are of the opinion that these are bills brought to set

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aside certain alleged fraudulent contracts entered into by complainant in ignorance of the fraud, and that it would therefore be a good defense to show that the complainant, after knowledge of the fraud, acquiesced in the contracts, or that it failed, upon being advised of the facts constituting the fraud, to repudiate them. Counsel for complainant insists that this is matter of defense, and must be pleaded and established by the respondents; that it was not necessary by averments in the bill to anticipate such a defense. Whether this position of the complainant's counsel is correct or not need not now be determined, because in three of the cases the bills contain the allegation that the fraud had been very recently discovered, and in the remaining case counsel say that a similar allegation was omitted by a clerical error, it being their purpose, out of abundance of caution, to insert the averment in all the cases. It may, therefore, be now inserted in the one case in which it is omitted. But it is further insisted that the bills are bad on their face, because they do not aver that complainant at once, upon discovering the fraud, repudiated and rescinded the fraudulent contracts. In one case the allegation is that the fraudulent acts were not discovered "until within a few weeks last past." In another, that the complainant had no knowledge of the fraud "until within a few days last past," and in a third the discovery is averred to have been made "within the three months last past."

We hold that these averments do not upon their face affirmatively show that complainant has been guilty of laches, nor that it has done anything to condone the frauds complained of, or to ratify the contracts alleged to be fraudulent. It is true, however, that even within the short period here named, the complainant may have acquiesced in the contracts, and by its acts may have confirmed them. If this is so, it must be pleaded as a defense and established by proof. Equity will not presume a ratification of a fraudulent contract by the injured party, if he files his bill to set it

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aside with reasonable promptness. No particular form of rescission is required. It need not be in writing. It is enough if from the time of discovery of the fraud the party injured abstains from any acts recognizing the fraudulent contract, and that within a reasonable time he brings suit or takes some other active measures to set it aside. A different rule as to pleading prevails where the bill shows upon its face that it is barred by the statute of limitations. In such a case the bill is demurrable; and if it be a bill for relief on the ground of fraud, filed after the time limited by law or the principles of equity for the filing of such bills, it must be alleged that the fraud was not discovered until within that period. *Moore v. Green*, 19 How. 69.

2. It is insisted that the bills are fatally defective for that the complainant has not tendered and does not offer to restore the property which it received in exchange for the land sold, and insists upon its right to retain the same and pay to respondents only its just cost to them. The averment in the several bills is in substance that respondents Power and Kindred were employed by complainant as its agents respecting the care, management and sale of certain lands of the complainant; that as such agents the duties of said respondents were, among other things, to negotiate sales of complainant's lands, and, in complainant's name and behalf, to enter into written contracts for such sale, to be made only to *bona fide* purchasers and at fair prices, and to collect and pay over to complainant the proceeds of sales, whether in money or in preferred stock of complainant; and in general to look after and promote the interest of complainant in all things concerning the care, management, valuation and sale of complainant's said lands. The preferred stock here referred to is alleged to have been the preferred stock of complainant which was outstanding, and the shares of which were receivable upon certain terms in payment for lands sold, at its par value. An examination of the several bills will show that, if they are true, the respondents Power and

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Kindred, while acting as such agents for complainant to make sales of its lands, undertook to purchase for their own use and benefit large quantities of the most valuable of the lands, by having them conveyed to third parties, who were to hold or convey for them, and by obtaining complainant's preferred stock in the market, and delivering it to complainant in payment for such lands, representing it as the stock paid in by the persons named by them as purchasers. In such a case the defrauded principal, when he is advised of the conspiracy and fraud, and repudiates the contracts made in pursuance thereof, is not bound to return to the dishonest agent anything beyond what has been received from him on account of the fraudulent transactions. An agent will not be permitted to make any profit out of transactions connected with his agency, and if he be an agent to sell property, he must not be allowed to purchase it.

These doctrines are elementary. *Mischaud v. Girard*, 4 How. 503; *Devone v. Fanning*, 2 Johns. Ch. 252; *Moore v. Moore*, 1 Selden, 262; *Gardner v. Ogden*, 22 N. Y. 347; *Conkey v. Bond*, 36 N. Y. 427; *Cook v. Woolen Mills*, 43 Wis. 433; Story on Agency, secs. 210, 211; Kerr on Fraud and Mistake, 174, 175, and cases cited.

If an agent shall make any profits in the course of his agency by any concealed arrangement, either in buying or selling, or other transactions on account of the principal, such profits will belong exclusively to the latter. Bigelow on Frauds, sec. 214. In the light of this doctrine we must construe and apply the rule upon which the counsel for respondents relies. That rule may be thus stated: A party to a contract who seeks to rescind it for fraud, must upon the discovery of the fraud offer to return whatever he has received upon the contract. *Farmers' Bank v. Groves*, 12 How. 57; Perry on Trusts, sec. 195. This rule no doubt applies here, but under it, in the light of the other doctrine above stated, what must complainant return to respondents? Clearly nothing that is in the nature of profits made in or

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growing out of the fraudulent transactions, for these were in equity the property of complainant from the moment they came into the hands of its agents. The stock, therefore, which the complainant received on account of the transactions in controversy was the consideration, and the only consideration, which complainant received for the contracts now sought to be set aside, and that, or what respondents paid for it, is all that complainant is bound to account to respondent for upon settlement, if the allegations of the bill are established. Where such an accounting is prayed, and it is averred that the sum due from the agent to the principal is larger than that received from the agent on the contract, it is not necessary that the principal upon filing his bill should actually pay back the money or property received on the contract; it is enough if he offers to credit it to the agent on settlement. In this view of the law the allegations now under consideration are deemed sufficient. The bills pray for an accounting for the proceeds of any lands acquired by the respondents in the manner set forth, and afterwards sold by them, after deducting from said proceeds the actual cost of the preferred stock turned over to the complainant.

This we conceive to be the correct basis for an accounting in such cases as are set forth in these bills. It may be that the stock is now worth more than at the time it was purchased by defendants and delivered to complainants. If so, to require complainants to return the identical stock, or its *present* market value, would be to pay to the respondents a profit to which, if the bills are true, they are not entitled.

I know of no rule applicable to cases of this character which can be reduced to practice consistently with the principles of equity, except the following: Where an agent has fraudulently made profits out of his agency at the expense of his principal, he shall account to his principal for all of such profits, and shall be allowed only the actual value of whatever he turns over to his principal, and if it be property

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purchased in the course of his agency, what he paid for it shall be considered its value.

He shall gain nothing by his fraud, and should consider himself fortunate and the law very merciful that he is allowed to escape actual loss.

3. It is insisted that in some of the cases the bills show a want of necessary parties, because the persons in whose names the respondents made purchases, and who afterwards conveyed as directed by respondents Power and Kindred, are not made parties. This point is not well taken. The only necessary parties are the persons who have some present interest in the controversy, and against whom the complainant has a right to decree for relief. The persons who are alleged to have been used as the instruments of the fraud, and who have, in pursuance of the conspiracy, conveyed to others the title which was once vested in them, are not necessary parties.

4. It is said that some of the bills are multifarious because each particular transaction charged is several in character; distinct from all the others, and should be the subject matter of a separate suit. The charge is a fraudulent combination and conspiracy entered into for the purpose of defrauding the complainant by obtaining its lands for less than their value, and through the fraud of its agents. The conspiracy is charged as one conspiracy, embracing within its scope numerous transactions. If such be the fact, one suit is sufficient. Story's Eq. Pleading, secs. 285, 285a, 286, 286a.

5. Has the complainant a remedy in equity against Power alone, upon the facts stated in the bill against him? We think so. It is clearly a bill to set aside a fraudulent contract and for discovery and an accounting. We have already held that the offer to return the stock, or the sum paid for it, by the respondents, is sufficient, and this disposes of the only ground upon which this objection is urged.

6. We think the bills contain a sufficient allegation of title in complainant to the lands described therein. It is averred

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that prior to the employment of Power and Kindred as its agents, the complainant had acquired said lands under the acts of congress mentioned, and by reason of the construction of portions of said line of railroad. This is sufficient.

7. Respondents object to certain general allegations of fraud in two of the bills. These, in substance, charge that the defendants, Power and Kindred, have been guilty of practices like those specifically set forth, in respect to numerous tracts of land of the complainant, other than those set forth; but as to the number of instances in which they have been guilty of such practices, and as to the description of the tracts and the details of such transactions, the complainant is ignorant, for the reason that respondents have concealed the same from complainant, and the complainant has not been able to discover the same. Allegations of this character are not demurrable. They show upon their face a sufficient reason for not being more specific, in that they aver concealment by the respondent.

The facts, when discovered, may be set out by way of amendment. This allegation may stand, if for no other purpose, as a foundation for an amendment of the bill hereafter, if further facts are discovered. It is, however, probably true that no decree could be based upon this general allegation as it stands. We are of the opinion that, upon the amendments of the bill in the case first named, so as to aver recent discovery of the facts constituting the alleged fraud, the demurrers should be overruled. So ordered.

NELSON, *District Judge*, concurs.

Palmer v. The Denver & Rio Grande R'y Co.

PALMER v. THE DENVER & RIO GRANDE R'Y CO.

(*District of Colorado. May, 1882.*)

1. **NEGLIGENCE — RAILROAD EMPLOYEES.**— Employees in the service of a railroad company accept the ordinary hazards — such perils as are incident to the service. But a company is bound to have safe and suitable machinery, so as not to expose employees to unnecessary dangers, such as may be avoided by reasonable care in the construction of cars and other apparatus upon the road. Averments in complaint in such case.

This is an action by an employee of the Denver & Rio Grande Railway Company for damages for injuries alleged to have been received by plaintiff in consequence of the negligence of defendant in failing to provide a suitable and safe caboose — the hearing being upon demurrer to the complaint, the averments of which are sufficiently stated in the opinion.

HALLETT, *District Judge.*— In this case there has been a good deal of discussion as to the sufficiency of the complaint. As it now stands, it is an action for injuries received by the plaintiff on account of the defective construction, as he alleges, of a caboose car attached to a freight train. The plaintiff was a brakeman in the service of the company, engaged in operating a freight train, and this car left the track, which gave him such alarm that he sprung from it, and received some injury to his shoulder by coming in contact with the earth.

He avers that the car in which he was riding was not properly constructed, that it had but four wheels, and these were attached to the car so firmly that there was no room for the wheels to accommodate themselves to the curves of the road; that whenever they came to a curve, the car was likely to leave the track, as it did on this occasion. He avers that when the road was first opened, when the company first began to operate the road, many of the caboose cars were constructed in this way, but that they had been

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withdrawn, nearly all of them — he does not say how many remained in use — that nearly all of them had been withdrawn by the company, and others put in their place, of the ordinary pattern, which were adapted to the service; that he himself had no knowledge of the defect in the car; it was so constructed as not to attract his attention, and he went upon it without suspicion of danger in respect to its adaptability to the service, and that it would not keep the track.

Assuming the facts to be as stated, I have no doubt as to the right of action in the plaintiff. Of course we understand that employees in the service of a railroad company accept the ordinary hazards; such perils as are incident to the service. But it is also a rule that the company is bound to have safe and suitable machinery in operating their road, so as not to expose the people in their service to unnecessary dangers, such as may be avoided by reasonable care in the construction of their cars and other apparatus upon the road.

At first I supposed that it was beyond question that the plaintiff must have been ignorant of the defect in the car, in order to recover in the action. That is averred in this complaint, that he was ignorant. After reading a great many cases, I have some doubt now upon that proposition.

It is a question in my mind whether such a defect as this, it being averred, or the facts being shown from which it would appear that the company, having knowledge of the dangerous character of the car, and the circumstance that some of the cars had been withdrawn from use, which may be said to afford some reasonable ground for belief on the part of the employees of the company that it was the intention of the company to withdraw all of them from use very soon, and in that way amounting almost to a promise that they would be withdrawn,— it is a question whether he might not recover, even if it should appear that the character of the car was known to him. But that is not presented in this demurrer. The averment here is that the defect was not

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known to him; that the cars generally in use upon the road were of a proper construction, and that this was a dangerous car, and which was liable to accident at all times. The company having knowledge of that fact, continuing to use it, it would seem that the right of action is clear.

The demurrer will be overruled.

W. W. Cover and *T. A. Green*, for plaintiff.

E. O. Walcott, for defendant.

MARTINDALE v. WAAS and others.

(*District of Minnesota. March, 1882.*)

1. PRACTICE—REHEARING.—Where the court has passed upon all the issues necessary to determine the rights of the parties, a motion for rehearing will be denied.
2. SAME—RULES OF PRACTICE.—A state law requiring a judge to give his decision in writing upon every issue made by the pleadings is not binding on the federal courts.
3. SAME—RULES OF PRACTICE IN FEDERAL COURTS.—The equity practice and procedure of the federal courts is regulated by the rules promulgated by the supreme court of the United States.

Motion for rehearing

NELSON, *District Judge*.—The motion is denied. The court passed upon all the issues necessary to determine the rights of the parties, and gave a decree in favor of the plaintiff. The law of the state of Minnesota requiring a judge to give his decision in writing upon every issue made by the pleadings is not binding upon the federal courts. The equity practice, as restricted by the rules promulgated by the supreme court of the United States, regulates the mode of proceedings, and no law of congress imposes upon the judge any such duty as indicated.

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When the main issue which controls the result is determined, all others presented by the pleadings are, by implication, decided in harmony therewith.

A. F. Foster, for motion.

A. F. Scott, against.

SINGER, BAER & Co. and others v. JACOBS and others.

(*Eastern District of Arkansas. April, 1882.*)

1. **FRAUD — SALE OF GOODS.**— Where a debtor sold his entire stock of goods to a purchaser with the intent to defraud his creditors, a full consideration paid by such purchaser will not protect him if he has notice, actual or constructive, that the vendor is selling to hinder and delay his creditors.
2. **SAME — NOTICE OF FRAUD.**— When the facts and circumstances are such as to put a reasonable man on inquiry, that obligation is not satisfied by an inquiry addressed to the chief actor in the suspected fraud, who has every motive for concealing the truth, when better and reliable sources of information are open to him.
3. **SAME — CONSTRUCTIVE NOTICE — AVOIDING SALE.**— To avoid a sale made to defraud creditors, it is not required that the purchaser should have actual knowledge of the fraudulent purpose of the vendor. It is sufficient if he had constructive notice.

At law.

The plaintiffs sued out an attachment against Jacobs, which was levied on a general stock of merchandise found in the possession of Thompson, who filed his interplea claiming to be the owner of the same. The following are the leading facts disclosed by the evidence:

On the first of August, 1880, the defendant Jacobs purchased at St. Louis, largely on credit, a fresh stock of general merchandise, with which he embarked in business as a retail merchant at Hope, in this state. The total amount of the stock when first purchased is not disclosed by the evi-

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dence, but it does appear that after selling from it in the ordinary course of business until the eighteenth of October, a period of two and a half months, there remained stock to the value of \$5,766, invoiced at cash price. This stock, on the eighteenth of October, Jacobs sold to Thompson, a merchant doing business in the same town, for cash, at the rate of fifty cents on the dollar of the cost price. The sale was consummated and the invoice of the goods taken after night and with closed doors. One or more agents of Jacobs' creditors were in the town at the time, pressing him for payment of overdue bills which he had promised to pay that night or the next morning. While the agents of the creditors were resting on this promise in the expectation of receiving payment the next morning, Jacobs and Thompson, with their clerks, five in number, were engaged in invoicing the goods, under lock and key, at a late hour of the night. Before the work of invoicing began, Thompson says: "I remarked I wanted no foolishness, and wanted to make a payment, and I paid Jacobs right then \$1,000 cash, and paid the balance in cash the next day." The creditors' agents finding the store closed the next morning, called to see Jacobs at his residence, when he feigned sickness, and assigned that as a reason why his store was not open.

The original invoices of the goods to Jacobs, which disclosed the terms upon which they were purchased, lay on the counter the night the goods were invoiced to Thompson, and reference was made to some of them by his clerks to ascertain the cost of the goods. Jacobs' general reputation for honesty and fair dealing was bad, and Thompson, who had known him many years, admits he knew him "to be tardy in paying debts, and tricky with his customers."

Previous to purchasing the stock of goods Jacobs had property worth \$2,000 or \$3,000, which he sold, but he had no other property or means which he could have used in the purchase of the goods, and Thompson knew this. Before Thompson concluded the purchase he employed an auctioneer

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to sell the goods at auction. Jacobs never paid his creditors any part of the money he received from Thompson, and has not paid any of his debts then existing, which amounted to \$2,500 and more.

Thompson testifies that Jacobs told him he was selling because he was indicted for an assault with intent to murder, and wanted money to fee counsel to defend him, and that he found he knew nothing about the dry goods business and wanted to get out of it. The indictment referred to by Jacobs was found a year before he purchased the goods, and this fact was known to Thompson, and he was not tried on it until some months after the sale. He testifies further, that before making the purchase he saw his attorney and asked him if he would get into trouble in making the purchase, and was told he would not. And Dr. Baylies, another merchant in the same town, says: "Thompson told me he had an opportunity of buying the Jacobs stock so that he could make some money on it, and asked me the question whether I thought there would be any impropriety in it, and I told him I thought not." He says he "asked Jacobs if he was involved with his creditors in any way," and that "he answered there was no claims against the goods;" that he was "led to believe and did believe Jacobs had paid for the goods;" and in conclusion he says, "I don't remember that Jacobs said he was or was not embarrassed. He assured me the goods were not incumbered." He did not ask to see Jacobs' books or his invoices, and did not look at the latter, though they lay on the counter before him, and made no inquiry of any one other than has been stated.

U. M. & G. B. Rose, Compton & Battle and Cohen & Cohen, for plaintiffs.

W. G. Whipple and C. E. Mitchell, for interpleader.

CALDWELL, *District Judge*.—It is not contested that on the part of the defendant Jacobs the sale of the goods was

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a premeditated and scandalous fraud upon his creditors. The general rules of law applicable to the controversy between the interpleader and the creditors of Jacobs are well settled. To avoid the sale it is not required that the purchaser should have had actual knowledge of the fraudulent purpose of the vendor. It is sufficient if he had constructive notice. The law relating to constructive notice in cases of fraud is well summarized by Mr. Bigelow in his treatise on fraud, pages 288, 289:

“If facts are brought to the knowledge of a party which would put him as a man of common sagacity upon inquiry, he is bound to inquire; and if he neglects to do so, he will be chargeable with notice of what he might have learned upon examination. . . .

“If, however, there be no fraudulent turning away from knowledge which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent or willful blindness, is all that can be imputed to a purchaser of property,—the doctrine of constructive notice will not apply to him.”

An actual agreement or conspiracy between Jacobs and Thompson that the latter would aid the former to defraud his creditors does not have to be shown. It is sufficient to avoid the sale if the facts and circumstances within the knowledge of Thompson are such as fairly to induce the belief that he either knew of the fraudulent purpose of Jacobs, or, having good reason to suspect it, he purposely refused to make inquiry, and remained willfully ignorant. A full consideration paid in cash will not protect a purchaser who has notice, actual or constructive, that the vendor is selling to hinder and delay his creditors; and the reason is, that, by aiding the debtor to convert his visible and bulky property, which cannot readily be concealed from creditors, into money, which it is easy to put beyond their reach, he knowingly assists the debtor to carry out his fraudulent purpose. *Clements v. Moore*, 6 Wall. 299, 311. It is not enough that a

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vendee is a purchaser for value; he must also be an innocent purchaser. The facts and circumstances within the knowledge of the interpleader were clearly sufficient to put him upon inquiry; and it is equally clear that such inquiry, directed to sources of information easily accessible, and to which any prudent man would have appealed, would have disclosed Jacobs' fraudulent purposes.

Some of the leading facts within the knowledge of the interpleader before he purchased are that he had known Jacobs for many years, and knew his general reputation for honesty was bad, and that he was not punctual in the payment of his debts; that the value of all the property and means that Jacobs possessed before he purchased the goods, and which could have been used in their purchase, did not exceed one-half of the value of the goods purchased; that it was unusual for country merchants to buy exclusively for cash; that no change had occurred in Jacobs' condition, in any way, between the date of his purchase of the goods and their sale to the interpleader; that the indictment against Jacobs was found months before he purchased the goods, and that the pretense that he must sell his entire stock at a great sacrifice for cash in hand to enable him to fee counsel to defend him in that case, was obviously false; that he was selling the stock for one-half of its cost in the height of the business season, and less than ninety after its purchase, and about the time debts contracted in its purchase would be maturing; that the interpleader, though a merchant in the same town, did not contemplate removing the goods to his own store, but expected to make money out of the purchase by selling them at public auction; that the same method of disposing of the goods was open to Jacobs, and there was no reason why he should not resort to it if he owed no debts and was honest; that Jacobs had not advertised in any mode his desire to sell his goods, and that he had probably not disclosed his purpose to do so to any other person. The interpleader knew these facts, and the mind cannot resist the conclusion

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that if he did not actually know of Jacobs' fraudulent purpose, it was because he was willfully blind, and fraudulently turned away from evidence of the facts.

It is quite evident the interpleader mistook the law, and supposed an actual lien on the goods was the only impediment to his acquiring a good title at any price for which Jacobs was willing to sell, and that bare knowledge on his part that Jacobs was making the sale to defraud his creditors would not affect him. The statement of the interpleader that he supposed the goods were paid for, is unsupported by any facts upon which to found such belief. It is not perceived why he should exhibit such excessive credulity on this point, and fail to give any effect to facts and circumstances tending so powerfully to establish the opposite conclusion. Such facility of belief, it has been well said, invites fraud and may justly be suspected of being its accomplice.

The law deals with the vendee and his acts upon the presumption that he is a man of ordinary intelligence, and he cannot evade responsibility by affecting to believe that which no man of ordinary intelligence, under the circumstances, would believe. He consulted an attorney, but upon what state of facts is not disclosed. Why consult an attorney if he felt no apprehension? Why was it necessary to consult an attorney before making this purchase more than any other? When locked up in the storehouse, after night, with Jacobs and the clerks, why should he pay \$1,000 on the purchase before they had begun to take the invoice if he did not apprehend danger from some of Jacobs' creditors, whose agents were then in the town, and which fact he probably knew or suspected? If this was not his motive, then he must have been prompted by an utter want of confidence in Jacobs' veracity and business engagements. Whether the act was induced by one or the other of these motives, it is inconsistent with his present attitude in the case. He began early to fortify himself to support a purchase, out of which he ex-

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pected to make money, but in making which he realized he was incurring some peril. If the sale and invoice of the goods had taken place in the ordinary manner, and during business hours, the fraud would have been detected and exposed at once by Jacobs' creditors, who were on the ground watching him. He does not say that Jacobs denied owing debts; he seems not to have pressed that point. But if he had done so, and Jacobs had answered, as he doubtless would, that he owed no debts, he could not, on the proof in this case, have sheltered himself behind such an answer.

When the facts and circumstances are such as to put a reasonable man upon inquiry, that obligation is not satisfied by an inquiry addressed to the chief actor in the suspected fraud, who has every motive for concealing the truth, when better and reliable sources of information are open to him. He had access to the original invoices, which disclosed the terms on which Jacobs purchased the goods; and if he had discounted the bills for cash, they would, according to mercantile usage, have shown that fact. It is not probable any merchant would purchase and pay for a large stock of goods without having some written evidence of the fact. These reliable sources of information, which lay on the counter before him, the interpleader refused to look upon. He purchased the goods out of the ordinary course of business for less than they were worth; the sale was consummated and invoice made in secret, after night, and in great haste, and under circumstances tending to show an active participation in the fraudulent purpose of Jacobs. But whether he was guilty of active participation in the fraud or not, he certainly "did buy recklessly, with guilty knowledge, or, which is the same thing, with such knowledge as would put a prudent man upon inquiry." *Howe Machine Co. v. Claybourn*, 6 Fed. Rep. 438; *Clements v. Moore*, *supra*.

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PULLMAN PALACE CAR CO. v. MISSOURI PACIFIC R'Y CO. and
another.

(*Eastern District of Missouri. April, 1882.*)

1. PLEADING — DEMURRER.— A demurrer admits all facts well pleaded, but not conclusions drawn therefrom by the pleader.
2. CORPORATIONS — CONTRACTS.— Where a railroad company made a contract concerning all roads which it then did or might thereafter control, by ownership, lease, or otherwise, and thereafter acquired more than a majority of the stock of B., another railway company, and by voting such stock elected B.'s board of directors; and where certain persons were members of the board of directors of both A. and B., and the same persons were respectively presidents and vice-presidents of both companies: *Held*, that A. had not acquired "control" of B. within the meaning of the terms of the contract, and that the word "control," as used in said contract, meant an immediate or executive control exercised by the officers and agents chosen by and acting under the direction of A.'s board of directors.

McCARY, *Circuit Judge*.— This case is before the court upon an application for a preliminary injunction to restrain respondents from violating a certain contract, and it has been fully argued by counsel, both orally and in print. The facts, so far as we deem it necessary to state them, are as follows: On the eighth of May, 1877, a contract in writing was entered into between the complainant and the respondent, the Missouri Pacific Railway Company, which gave complainant the exclusive right for a term of fifteen years to furnish to the railway company drawing-room and sleeping cars for use upon its railroad, and bound the company, upon certain terms and conditions, to haul said drawing-room and sleeping cars over its line of railroad.

The provisions of this contract now to be considered are those by which it was provided that it should include not only the railway then controlled by the Missouri Pacific Railway Company, but also all roads said railway company might thereafter control by ownership, lease, or otherwise.

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These provisions are to be found in the seventh and twelfth clauses of the contract, which are as follows:

"*Seventh.* In consideration of the use of the aforesaid cars, the railway company hereby agrees to haul the same on the passenger trains on its own line of road, and on all roads which it now controls, or may hereafter control, by ownership, lease, or otherwise, and also on all passenger trains in which it may, by virtue of contracts or running arrangements with other roads, have the right to use such cars in such manner as will best accommodate passengers desiring the use of said cars. And the railway company shall, at its own expense, keep said cars in good running order and repair, including renewals of wornout parts, and all things appertaining to said cars necessary to keep them in first class condition."

"*Twelfth.* The railway company hereby agrees that the Pullman Company shall have the exclusive right, for a term of fifteen years from the date hereof, to furnish for the use of the railway company drawing-room, parlor and sleeping cars on all the passenger trains of the railway company, and over its entire line of railway, and on all roads which it controls, or may hereafter control, by ownership, lease, or otherwise, and also on all passenger trains on which it may, by virtue of contracts or running arrangements with other roads, have a right to use such cars, and that it will not contract with any other party to run said class of cars on and over said lines of road during said period of fifteen years."

The contention of the complainant, which lies at the foundation of its right to an injunction, is that since the execution of the contract the said Missouri Pacific Railway Company has acquired control of the St. Louis, Iron Mountain & Southern Railway, so as to bring the line of that road within the terms and subject to the operation of the contract. The facts upon which this claim rests, as they are set forth in the bill, are, in substance, that prior to December, 1880, the Missouri Pacific Railway Company acquired and became

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the owner of more than a majority of the stock of the St. Louis, Iron Mountain & Southern Railway Company, and that such purchase was made with the intent of controlling the management and administration of the last named road, and of running the two roads as one line, and in the interest of the Missouri Pacific Railway Company; that the present board of directors of the Iron Mountain Company was elected by the vote of the shares of stock owned by the Missouri Pacific Company; that certain persons, seven in number, are members of the board of directors of both companies, and that the same persons are respectively presidents and vice-presidents of both companies; that by reason of such purchase and ownership of the capital stock of the Iron Mountain Company by the Missouri Pacific Company, the former corporation has, in contemplation of law and effect, passed under the control of the latter, so as to bring the same within the scope and operation of the contract above named.

Respondents demur to the bill, and thus admit the averments therein, so far as they are well pleaded, but not the conclusions drawn by the pleader from the facts stated. The demurrer raises the question whether, upon the facts stated in the bill, the complainant is right in its contention that the Iron Mountain road has passed under the control of the Missouri Pacific Company, within the meaning of the contract.

What are we to understand by the word "control" as employed in the contract? The language is, "all roads which it controls or may hereafter control." This language does not refer to the ultimate power of control which always lies in the stockholders, and which may be indirectly exercised by them at stated periods by the election of directors. It means the immediate or executive control which is exercised by the officers and agents chosen by and acting under the direction of the board of directors. Every corporation, whether private, public, or *quasi* public, has a constituency behind it to which it is responsible, and by which it may in the end be controlled; but when we speak of a corporation

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in a contract or a statute we do not refer to this constituency, but to the artificial person which acts only according to its laws and through its agents and officers. Thus a municipal corporation — as, for example, a city, county, or town — is in one sense composed of all the voters of the municipality; but when it is referred to in a statute or contract, it is always mentioned in its corporate capacity as a single person, having certain specified powers, and not with any reference whatever to the body of electors by whom its officers are chosen, and may from time to time be changed. A statute providing that a railway company shall be subject to the control of a county or city would not be construed as having contemplated control by the majority of the voters, but by the constituted authorities of such county or city for the time being. The same rule applies to other corporations; and where a contract contemplates corporate action, we must always understand that action by the proper authorities and not action by the stockholders is intended. It is conceded in this case that the two corporations continue to exist and to act separately, each through his own agents and officers. There has been no absorption of one by the other. There are still two sets of officers, two boards of directors, and in fact two complete corporations. True, it is admitted the same persons are in several instances officers and directors of both companies. But it is difficult to see how this places one corporation under the control of the other. If it does, how are we to determine which is the controlling and which the subordinate company? It may be true that the two companies are acting in harmony, and that the same persons own a majority of the stock of both; but this is something very different from the control of one by the other. It is contended that the owner of the stock, or a majority of it, should be regarded, for the purposes of the contract in question, as the owner of the railway. But even if this were admitted, it would not avail the complainant. The contract calls for control, not merely ownership. The owners of a

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railway may not control it. The language of the contract upon this point was, no doubt, carefully chosen, and is several times repeated. The roads to be brought within the terms of the contract were described as "all roads which the railway company now control, or may hereafter control, by ownership, lease, or otherwise." There must be control, and it may be by ownership, lease or otherwise, so that the ownership of nearly all the stock is not enough. The court cannot say as a matter of law that this gives the control which the contract calls for. The stock of a corporation is constantly changing hands. Before the decree could be executed in this case, the stock of the Iron Mountain Company might pass to other hands. The stockholders of to-day may not be the stockholders of to-morrow. Besides, the stockholders of these two companies may, for any reason satisfactory to them, consider it for their interest to continue both corporations in existence, reserving to each all its rights under the law. Their right to do so is clear, and for aught that appears this is precisely what they have done. The purchaser of the majority of the stock of the Iron Mountain Company, although that purchaser was the Missouri Pacific Company, acquired the right to continue the former corporation as a separate and independent body corporate, and this court cannot compel it to forego that right. Each of these corporations has its own charter or articles of incorporation, its own board of directors and executive officers. They exist under and by virtue of separate and distinct acts of incorporation, and if the Missouri Pacific does not see fit to take the legal control of the Iron Mountain road, the court cannot require it to do so.

MILLER, *Circuit Justice (concurring)*.—I concur in overruling the motion for an injunction. Let the order be so entered.

Edward Isham and Noble & Orrick, for plaintiff.

John C. Brown and Thomas J. Portis, for defendants.

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COLBURN, Adm'r, etc., v. VAN VELZER.

(*District of Minnesota. May, 1882.*)

1. **ASSIGNMENT — VOID — UNDUE INFLUENCE — FEEBLE MIND.**— Where a person feeble in mind and body, and incapable of exercising control over his property, or of managing it in a prudent, careful manner, or of making any contract in reference thereto, was unduly influenced to purchase an interest in a patent-right of doubtful utility, and in consideration therefor to assign notes and a mortgage on real property to the defendant, *held*, that such assignment is void, and transfers no title to the assignee.

NELSON, *District Judge*.— This is a suit in equity brought to set aside an assignment of certain notes and a mortgage, executed by the complainant's intestate during his life-time.

FINDING OF FACTS.

I find that Joseph Prescott, a citizen of the state of Minnesota, died at Prairie du Chien, July 14, 1880, intestate, leaving property and effects in the county of Fillmore. On August 7, 1880, the complainant was appointed administrator of the estate by the probate court of that county, and duly qualified and entered upon his duties as such administrator; that on or about November 12, 1877, Prescott had a stroke of apoplexy, followed by partial paralysis of his left side, arm, and leg; that he remained, after stricken down, for several days, in an unconscious and semi-comatose state; that his mental faculties were seriously impaired by the attack and have never been fully restored; that he was afterwards, and up to the time of his death, in a weak and feeble condition of mind and body, which incapacitated him from properly and carefully attending to his business and managing his property; that he continued to decline in health after treatment for the disease, and at no time regained the strength and vigor which he possessed before; that he was aware of his impaired condition of mind after unsuccessful treatment in the spring of 1878, and transacted very little

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business without consultation with others; that in November, 1879, he was treated at Cresco, Iowa, for his enfeebled condition of mind and body, and subsequently, about the middle of the month, went alone, without the knowledge of his friends, to Prairie du Chien, where he died, as stated above; that before his death, and while in an enfeebled condition of mind and body, not competent to exercise control over his property or manage it in a prudent, careful manner, and not capable of making any contract with reference thereto, and being unduly influenced by the defendant, Prescott was induced to purchase an interest in a patent-right which the defendant claimed to own and which he knew was of doubtful utility; that the transaction between the deceased and the defendant, and the circumstances surrounding them, show an intention on the part of the defendant to take advantage of the enfeebled condition of Prescott's mind to overreach him and obtain, if possible, control of a part of his property; that on the ninth of December, 1879, through the undue influence of defendant, Prescott was induced to purchase an undivided one-third interest in a patent whiffletree, and as payment therefor to assign a note and mortgage of the value of more than \$1,000; and also, on or about the first day of January, 1880, when he was in this weak and enfeebled condition of mind and body, and not competent in law to enter into a contract or manage his property, the said defendant, by undue influence and with the intention of overreaching, induced him to purchase the other two-thirds of the patent-right, and obtained as the purchase price the assignment to himself of the note of Robert Hulton for the sum of \$1,000, secured by a mortgage upon real estate in Fillmore county aforesaid, said note bearing date March 7, 1878, and payable in three years, with interest at ten per cent., and also the note of J. P. Tibbits for the sum of \$500, dated February 25, 1878, payable in six months, with interest at the rate of twelve per cent., and also the note of H. S. Bassett for the sum of \$500, dated November 13, 1878, and

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payable in one year, with interest at twelve per cent.; that the assignment of the notes and mortgage was dated January 1, 1880, and acknowledged January 26, 1880, and on March 10, 1881, filed for record and recorded in the office of the register of deeds of Fillmore county.

The further fact is found that the notes are in the possession either of the administrator, or in the bank at Preston, subject to the control of the administrator.

In the view taken by the court of the conclusions of law resulting from the foregoing facts, it is unnecessary to consider the evidence with reference to the proceedings taken before the judge of probate in Fillmore county, under which a guardian was appointed.

CONCLUSIONS OF LAW.

1. The assignment of the notes and mortgage is void, and transfers no title in and to the same to the assignee, the defendant in this suit.

2. A decree will be entered, with costs, in favor of the administrator, adjudging that the said assignment of the said note and mortgage executed by Robert Hulton, and the notes of J. P. Tibbits and H. S. Bassett, be and the same is of no effect, and that the same be set aside.

3. That the title and control of the said notes and mortgage is in the administrator, the complainant in this suit, and held by him for the use and benefit of the estate.

N. P. Colburn, for complainant.

C. M. McCarthy, for defendant.

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ABANDONMENT. See *Mining Claim*, 9.

ACCESSORIES. See *Criminal Law*, 1.

ACT. See *Statute*.

ACTION. See *Jurisdiction*, 9, 10. *Corporation*, 8. *Removal*, 13, 14.

1. ACTION FOR MONEY HAD AND RECEIVED — WHEN IT MAY BE JOINT.— In order to maintain an action for money had and received, it must appear that the money was jointly received by all the defendants; upon this the law may imply a promise on the part of all to pay to the rightful owner. If A. receive money to the use of B., and turn it over to C., B. cannot maintain a joint action against A. and C. for money had and received to the use of himself, for the reason that they did not jointly receive the money—although this form of action might be maintained against either A. or C. separately. *Simmons v. Spencer et al.*, 48
2. TROVER — JOINT ACTION IN.— To maintain a joint action in trover, it must appear that the specific money, or thing sued for, came into the hands of the defendants successively. *Id.*

ADMIRALTY.

1. COLLISION — RULE IN ADMIRALTY.— Where there is a collision between two vessels, and one of them is sunk and its cargo lost, and the fault is all on one side, the party owning the vessel in fault must bear all the loss. If both are in fault, the loss and costs of suit are equally divided between the owners of the two vessels. *The J. S. Neil*, 177
2. HOW VESSELS SHOULD STEER IN PASSING EACH OTHER.— Where a steamboat, in ascending a stream, has to pass a descending boat, it should keep within the larboard half of the navigable channel, and the descending boat should keep within the other half. *Id.*
3. COLLISION — DIVISION OF DAMAGES.— Where, in case of a collision between two vessels, there is mutual fault, the damages should be equally divided between the owners. *Memphis & St. Louis Packet Co. v. The H. C. Yaegar Trans. Co.*, 259
4. SAME — MEASURE OF DAMAGES — REPAIRS — DETENTION.— The damages to be divided in such cases are those necessarily resulting

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from the collision. If repairs are necessitated their actual cost should be taken into account. If the injured vessel is bound on a voyage and is detained by reason of the collision, the loss from detention also constitutes part of the damages. *Id.*

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AFFIRMANCE. See *Contract*, 10.

AFTER-ACQUIRED PROPERTY. See *Mortgage*, 1. *Vendor's Lien*, 3.

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APPLICATION OF PAYMENTS. See *Payments*, 1, 3, 4.

ASSESSMENT. See *Stockholders*, 1. *Revenue*, 1, 2, 3, 4.

ASSIGNMENT. See *Fraudulent Purchase*, 1: *Letters Patent*, 1. *Corporation*, 7. *Lease*, 3, 4.

1. **EQUITABLE ASSIGNMENT OF PART OF DRAWER'S FUND ON DEPOSIT.**—Where the depositor of a fund in a bank draws his check for a part of that fund, which is presented in due time, this is an appropriation, and an equitable assignment of so much of the fund as is called for by the check, although no action at law could be maintained upon it. *First Nat. Bk. of Cincinnati et al. v. Kersey Coates et al.*, 9
2. **SAME — ASSIGNMENT FOR BENEFIT OF CREDITORS.**—Where a debtor, having a large fund in bank, drew his checks in favor of certain creditors, and thereafter, before said checks were presented, made a general assignment of all his property for the benefit of his creditors, under a state insolvent law: *Held*, that the checkholders who presented their checks and demanded payment, while the funds remained in the hands of the bank, were entitled to payment as against the assignee. The checks amounted to an appropriation of so much of the fund on which they were drawn, and, to that extent, it did not pass to the assignee. *Id.*
3. **PRESENTATION OF CLAIM TO ASSIGNEE — ELECTION OF REMEDY.**—The presentation of the checkholders of their claims to the assignee, and his allowance of them, and their receipt of dividends under the assignment, was not the election by them of a remedy which prevents a recovery in this case, *Id.*

ASSIGNMENT — continued.

4. **ASSIGNMENT IN TRUST FOR BENEFIT OF CREDITORS, WHEN VOID.**—
A deed of assignment for the benefit of creditors, which in terms directs or authorizes the assignee to execute the trust and dispose of the property in a mode not authorized by the statute, or contrary to its requirements, is void. *Schoolfield, Hanauer & Co. v. Johnson & Sullivan et al.*, 551
5. **ASSIGNMENT — VOID — UNDUE INFLUENCE — FEEBLE MIND.**—
Where a person feeble in mind and body, and incapable of exercising control over his property, or of managing it in a prudent, careful manner, or of making any contract in reference thereto, was unduly influenced to purchase an interest in a patent-right of doubtful utility, and in consideration therefor to assign notes and a mortgage on real property to the defendant, *held*, that such assignment is void, and transfers no title to the assignee. *Colburn, Adm'r, etc., v. Van Velzer*, 650

ATTACHMENT.

1. **ATTACHMENT — GARNISHEE — STATUTORY BOND.**— Sections 111, 112, Colorado code, do not provide for the discharge of garnishees upon the execution by defendant in attachment of the bond mentioned therein, but only for the release of property taken under attachment and the proceeds of the sale thereof in the hands of the officer. A bond executed in accordance with the provisions of said sections to secure the discharge of a fund in the hands of a garnishee, would not be valid as a statutory undertaking. But if the garnishee pay to the officer money due from him to defendant as provided in the statute, the defendant may have that money released to him by giving a forthcoming bond, pursuant to said sections. *Henry et al. v. Gold Park Mining Co.*, 890
2. **ATTACHMENT SUIT — JOINT LIABILITY — SEPARATE PROPERTY.**—
Where the state code provides that judgment may be rendered "for or against one or more of several defendants," according as the proof may warrant, it is a provision as applicable to suits by attachment as to suits in any other form; and where an attachment is sued out against two persons jointly, it may be sustained as against the separate property of one alone. *Allen, West & Bush v. Clayton & Prewit*, 517

ATTORNEY. See *Bankruptcy*, 1, 2. *Set-off*, 1.

1. **ATTORNEY — LIEN UPON JUDGMENT FOR FEES — LACHES.**— An attorney who conducts a suit for his client and obtains a judgment therein, upon which he is entitled to a lien for fees, is not bound to make himself a party to the record in order to enforce his lien; and if he has perfected his lien according to law and given notice

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as required, he may enforce it notwithstanding a compromise and settlement between his client and the adverse party. *Patrick v. Leach et al.*, 555

2. **SAME — RIGHT OF ATTORNEY TO BE MADE A PARTY.**— If it appears to the court after judgment, and in a suit brought to set the same aside, that it may be necessary for the protection of the rights of the attorney that he be made a party to the suit, an order allowing him to intervene will be made. *Id.*
3. **ATTORNEY AND CLIENT — PURCHASE BY ATTORNEY FROM CLIENT PENDENTE LITE.**— The question whether an attorney at law can, under any circumstances, purchase *pendente lite* from his client the subject matter of litigation in which he is employed and acting, suggested, but not decided. *Rogers v. Marshall et al.*, 76
4. **SAME — SAME — ATTORNEY CANNOT ACT IN THE DOUBLE CAPACITY OF ADVISER OF CLIENT AND PURCHASER FROM HIM.**— Equity will not uphold such a sale, even upon a showing of good faith, where it appears that the attorney, while negotiating for the purchase of the property, was at the same time advising the client as to the probable outcome of the litigation concerning it. *Id.*
5. **SAME — SAME — SAME.**— It is contrary to law and equity to permit an attorney, at the same time and in the same transaction, to occupy the antagonistic and incompatible positions of adviser of the client, concerning the pending litigation threatening his title to property, and of purchaser of such property from him. *Id.*
6. **SAME — DUTY OF ATTORNEY TO MAKE FULL DISCLOSURE.**— Some of the rules regulating dealings between client and attorney stated. The former must make full disclosure of every fact which might influence the decision by the client of the question of the sale. All presumptions are against the attorney. *Id.*
7. **SAME — IF ATTORNEY PURCHASES FOR A THIRD PARTY, HE MUST DISCLOSE THE FACT.**— If an attorney can show that he is entitled to purchase property, notwithstanding his character of attorney, yet if, instead of openly purchasing it, he purchases it in the name of a third person, without disclosing the fact, the purchase is void; and the same rule prevails where the attorney, while professing to purchase for himself, really purchases in part for his client's copartners, and suppresses the fact. *Id.*
8. **SAME — SUCH THIRD PARTIES STAND IN THE ATTORNEY'S SHOES.**— Where an attorney purchases from his client in his own name, but in secret trust for third parties, to whom he subsequently conveys, such third parties stand in his shoes, taking the chances as to the validity of the purchase. *Id.*
9. **ATTORNEY AND CLIENT — WHAT CONSTITUTES THE RELATION.**— Where an attorney appeared of record for a client, with the

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client's knowledge and consent, and conducted a litigation, nothing more was necessary to constitute the relation of attorney and client. *Id.*

BAILEE. See *Railroad*, 5.

BANKING. See *Negotiable Instrument*, 3.

1. **BANK CHECK.**—An order drawn at Kansas City, Missouri, on a bank in New York city, to pay money to H. C. or order on demand, without days of grace, is a bank check. *First Nat. Bk. of Cincinnati et al. v. Coates et al.*, 9

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1. **BANKRUPTCY — ATTORNEY'S FEES — ACT OF 1875 — GENERAL ORDER OF THE SUPREME COURT.**—An attorney's fee of \$20 is all that can be allowed for obtaining an involuntary adjudication in bankruptcy. *In re Bignall, Bankrupt*, 440
2. **SAME — SAME.**—Where the assignee of a bankrupt had made an agreement with attorneys whereby they were to prosecute certain cases, and were to receive, if successful, such sum for their services as the court might allow, and they had thereupon instituted suits, gone to some expense and great trouble, and recovered large sums which otherwise would have been lost to the creditors of the bankrupt, an allowance of twenty per cent. upon the amounts recovered *held* reasonable. *Id.*
3. **BANKRUPTCY — PRINCIPAL AND AGENT — R. S. § 5017.**—Where a commission merchant, as agent of the owner, sells goods and fails, without fraud, but because of insolvency, to account for the proceeds of the sale, and subsequently becomes a bankrupt and receives his discharge in bankruptcy, the proceedings in bankruptcy will discharge his debt to his principal. *Zeperink et al. v. Card et al.*, 549

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BILL OF REVIEW.

1. **BILL OF REVIEW — WHEN TO BE FILED.**—A bill of review is in the nature of a writ of error, and when it seeks a review for errors apparent upon the face of the record, will not lie after the time within which a writ of error could be brought. *Taylor et al. v. Charter Oak L. Ins. Co.*, 484
2. **SAME — INJUNCTION.**—In so far as an injunction is sought in this case because of matters appearing in the supplemental decree, no relief can be granted, because it does not appear that the complainant was prejudiced or injuriously affected by anything contained in said supplemental decree. *Id.*

BONA FIDE PURCHASER. See *Vendor's Lien*, 4.

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CHAMPERTY.

1. **CHAMPERTY — AS A DEFENSE.**—The fact that there is a champertous and illegal contract between plaintiff and his attorney for the prosecution of a cause of action is no ground of defense to the action, and can only be set up by the client against the attorney when the champertous agreement itself is sought to be enforced. *Courtright v. Burnes*, 60

CHARGE. See *Trial by Jury*, 6.

CHATTEL MORTGAGE.

1. **CHATTEL MORTGAGE — FORECLOSURE THROUGH SHERIFF UNDER STATUTE.**—When, under the statute of Minnesota, a chattel mortgage is placed in the hands of the sheriff with orders to seize and sell the mortgaged property for the purpose of paying the mortgage debt, the sale is made by virtue of legal proceedings, and the proceeds of the sale are not voluntary payments the application of which the debtor is authorized to direct; and the creditor may apply such proceeds to the payment of any one of several notes secured by the mortgage. *Nichols, Shepard & Co. v. Knowles*, 477
2. Where a creditor holds several notes secured by mortgage, one of which is secured by the indorsement of a third party as well as by the mortgage, it may be inferred, in the absence of evidence, that the parties intended to apply the proceeds of the sale of mortgaged property first to the notes not otherwise secured, so as to give the creditor the full benefit of all his security. *Id.*

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1. COMMON CARRIERS — RAILROAD COMPANIES NOT ENTITLED TO OPEN EXPRESS MATTER.— A railroad company has no right to open and inspect packages conveyed over its road which are in charge of an express company. *Express Cases*, 147
2. SAME — EXPRESS COMPANIES ENTITLED TO DO BUSINESS ON RAILROADS — RAILROAD COMPANIES BOUND TO FURNISH PROPER FACILITIES — DISCRIMINATION.— Railroad companies are bound, as common carriers, to allow express companies to do business on their roads, and to provide such conveyances, by special cars or otherwise, attached to their trains, as are required for the safe and proper transportation of express matter, and they are bound to extend the use of such facilities on equal terms to all who are engaged in the express business. *Id.*
3. SAME — RATES OF COMPENSATION.— Railroad companies are entitled to fair and reasonable rates of compensation. *Id.*
4. SAME — HOW FIXED WHERE PARTIES DISAGREE.— Where rates of compensation cannot be agreed upon, the question of what rates are fair and reasonable is for the courts to decide. *Id.*
5. SAME — CANNOT BE FIXED BY RAILROAD COMPANY.— A railroad company cannot lawfully fix upon an absolute rate of compensation and insist upon being paid by express companies in advance or at the end of each trip. *Id.*
6. SAME — WHERE THERE HAS BEEN NO PREVIOUS ARRANGEMENT AS TO RATES.— Where no previous arrangement has existed, the court may devise a mode of compensation to be paid as the business progresses, with power of final revision. *Id.*
7. SAME — WHERE A PREVIOUS ARRANGEMENT HAS EXISTED.— Courts may assume that rates of compensation which have existed between such companies are *prima facie* reasonable and just, and may require parties to conform to them as their business progresses, with the right on either side to keep and present an account of their business to the court at stated intervals, and claim an addition to or rebate from the amount so paid. *Id.*
8. SAME — RAILROAD COMPANIES ENTITLED TO SECURITY.— In such cases the railroad company may require a bond from the express company in advance to secure the payment of any amount which may thereafter be found to be due. *Id.*

COMMON CARRIER — continued.

9. **SAME — PROVISIONS OF THE CONSTITUTIONS AND STATUTES OF MISSOURI AND ARKANSAS.**—Statutory and constitutional provisions establishing maximum rates for transportation of passengers and freight on railroads, and forbidding discrimination in charges or facilities in transportation between transportation companies and individuals, do not present any obstacles to the enforcement of the rights of express companies in the manner above indicated. *Id.*
10. **COMMON CARRIERS — NEGLIGENCE.**—Where two or more railroads, by an arrangement between themselves, establish a route to a certain point, and contract to carry a passenger over their roads to the terminal point, the terminal road is liable to him, as a common carrier, if, while being conveyed by it to his destination, he is injured, either through the negligence of its immediate employees or others with whom it has contracted for motive power or other service. *Keep v. R. Co.*, 208
11. **SAME — LIABILITY OF PARTY FURNISHING MOTIVE POWER TO A RAILROAD.**—A corporation furnishing motive power to a railroad company, but not acting, or chartered to act, as a common carrier, is not bound to use more than the ordinary skill and diligence which its employment needs, and is only liable for direct negligence or unskillfulness. *Id.*
12. **SAME — SAME.**—Where a common carrier employs another party to furnish motive power, and through the direct negligence of the latter, a passenger, being conveyed by the carrier, is injured, and the carrier is also at fault, and the passenger brings a suit against each party, and both suits are tried together, the same amount of damages should be rendered against each. Under such circumstances the satisfaction of the judgment in either case should be made to operate as a satisfaction in both. *Id.*
13. **SAME — SAME — MEASURE OF DAMAGES.**—A party who receives a physical injury through the negligence of another, should be allowed sufficient damages to compensate him for the amount of his expenditures and losses in consequence of the injury, taking also into consideration the extent of his injuries, his sufferings, and the effect of the accident on his general health. *Id.*
14. **COMMON CARRIER — BILL OF LADING — NEGLIGENCE.**—A provision in a bill of lading, issued by a common carrier, to the effect that the carrier shall not be liable for loss by fire, will not exempt it from liability for a loss by fire occurring through its negligence. *Prest., etc., Ins. Co. of N. A. v. St. Louis, I. M. & S. R. Co.*, 283
15. **SAME — NEGLIGENCE.**—Where a common carrier undertakes to transport cotton for hire upon open flat cars, it is bound to

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take all needful precautions for the cotton's safety and protection. *Id.*

16. **SAME — SAME — MEASURE OF DAMAGES.**— Where cotton in course of transportation by a common carrier was destroyed by fire in consequence of the carrier's gross negligence, and the owners assigned and transferred their interest in said cotton and their rights against said carrier to a fire insurance company, by which the cotton was insured, upon its indemnifying them for the loss sustained, *held*, that the insurance company was entitled, as against the carrier, to the value of the cotton at the time of the loss, with six per cent. interest from the day upon which the cotton would probably have been delivered to the owners if it had not been destroyed. *Id.*

17. **COMMON CARRIER — LIEN OF, DEPENDS ON CONTRACT.**— The lien of a common carrier on goods transported depends on the contract with the owner. Ordinarily the law implies such lien, and it will be held that, in delivering goods to be carried, the owner assents to the condition that the carrier may retain possession of the goods until his reasonable charges have been paid, although nothing may be said on the subject. But when goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money. Nor in case of prepayment of the freight upon contract for through rate. *Marsh v. U. P. R'y Co.*, 286

18. **SAME — THROUGH RATE — RECEIVING GOODS WITH KNOWLEDGE OF CONTRACT FOR.**— A common carrier receiving goods from another carrier, with knowledge that a through contract has been made, and the price of transportation to the point of destination paid in advance, can assert no lien on such goods for transporting them over its line. *Id.*

19. **RAILROADS — COUPON TICKETS — RIGHTS OF HOLDERS.**— Where a railroad company issues a ticket entitling the holder to a passage over its own and connecting lines to the place of destination mentioned in the ticket, and there is no limitation in it upon the right of the holder to transfer it to another, *held*, that upon the refusal of a connecting line to accept the ticket, and of the contracting company to furnish a local ticket over that line or the amount of money necessary to procure one, the holder has a right of action against the original contracting company for breach of contract; and this right is assignable, under the laws of the state of Colorado, so as to give a right of action to the assignee. *Hudson v. K. P. R'y Co.*, 249

20. **COMMON CARRIER — NEGLIGENCE — MOTIVE POWER.**— A common carrier is liable to a passenger whom it has contracted to

COMMON CARRIER—continued.

convey to a particular point, if he is injured while being so conveyed through the negligence or unskillfulness of employees of a corporation with which such carrier has contracted for motive power. *Keep v. R. Co.*, 302

21. **LIABILITY OF PARTY FURNISHING MOTIVE POWER — NEGLIGENCE — UNSKILLFULNESS.**—In such cases the corporation furnishing the motive power is also liable to the passenger if the injury is sustained through the direct negligence or unskillfulness of its employees. *Id.*

COMPENSATION. See *Common Carrier*, 3, 4, 5, 6, 7. *Constitutional Law*, 4.

COMPOSITION DEED. See *Deed*, 4.

CONSIDERATION. See *Contract*, 2. *Deed*, 2, 3. *Equity*, 8. *Principal and Agent*, 1.

CONSPIRACY. See *Constitutional Law*, 3.

CONSTITUTION — FEDERAL. See *Constitutional Law*, 4. Art. 4, § 1, see *Constitutional Law*, 5. Art. 5 to Amendment, see *Constitutional Law*, 1, 3.

CONSTITUTION — STATE. Arkansas — see *Common Carrier*, 9. Kansas — see *Constitutional Law*, 4. *Homestead*, 1. Missouri — see *Common Carrier*, 9. Art. 4, § 50, see *Statute*, 2. Art. 15, § 1, *id.*

CONSTITUTIONAL LAW. See *Municipal Bonds*, 4.

1. **CONSTITUTIONAL LAW — INFAMOUS CRIMES — ARTICLE 5 OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES CONSTRUED.**—No crime is infamous, within the meaning of article 5 of the amendments to the federal constitution, unless expressly made infamous or declared a felony by an act of congress. *United States v. Wynn*, 266.

2. **SAME — SAME — STEALING FROM THE MAIL — PRACTICE — INFORMATION.**—Stealing from the mail is not an infamous crime, and may be prosecuted by information. *Id.*

3. **CONSTITUTIONAL LAW — INFAMOUS CRIMES — CONSPIRACY TO MAKE COUNTERFEIT COIN — PRACTICE — INFORMATION.**—A conspiracy to make counterfeit coin is not an infamous crime, within the meaning of article 5 of the amendments to the United States constitution, and may be prosecuted by information. *United States v. Burgess*, 278

4. **CONSTITUTIONAL LAW — TAKING PRIVATE PROPERTY FOR PUBLIC USE — COMPENSATION.**—Under the provisions of the constitution of the United States and of the state of Kansas, it is held that the payment of compensation to the owner of private property taken for a public use is a condition precedent to any right divesting the owner of his possession, and that a judg-

CONSTITUTIONAL LAW — continued.

ment in his favor for the value of the land, unpaid and unsecured, is not compensation, and does not justify his eviction.

Pryzbylowicz v. Mo. R. R. Co., 586

5. CONSTITUTIONAL LAW — JUDGMENTS — ARTICLE 4, § 1, OF THE CONSTITUTION OF THE UNITED STATES.—The provision of the federal constitution that “full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,” only relates to the validity and effect of judgment rendered in one state when proved in another. *Wiggins Ferry Co. v. C. & A. R. Co.*, 609

6. SAME.—The duty of the courts of one state to follow the decisions of another, upon questions arising upon the construction of the statutes of the latter, is a duty resting upon comity, and is not imposed by the federal constitution. *Id.*

7. SAME — REMOVAL OF CAUSES.—Where two corporations, organized under the laws of Illinois, executed a contract to be performed in that state, which, according to the decisions of the supreme court of the state, they had no power to make, and which, according to said decisions, was void, and one of the contracting parties brought suit in a court of the state of Missouri, the supreme court of which had previously, in a suit between the same parties, held the contract valid, *held*, that the cause could not be removed to this court because of said failure of the supreme court of Missouri to follow the decisions of the supreme court of Illinois, the case not resting on a federal law. *Id.*

CONSTRUCTION. See *Contract*, 11.

CONSTRUCTIVE NOTICE. See *Fraud*, 8.

CONSTRUCTIVE SERVICE. See *Notice*, 1.

CONTRACT. See *Champerty*, 1. *Corporation*, 9. *Equity*, 13, 14. *Master and Servant*, 1. *Mining Claim*, 9. *Municipal Bonds*, 4.

1. CONTRACT — PAROL EVIDENCE.—Parol testimony of a contemporaneous agreement is not admissible to contradict or vary the terms of a written contract. *Courtright v. Burnes*, 60
2. SAME — DEFENSE OF WANT OF CONSIDERATION.—The defense of want of consideration may ordinarily be made at law; but when a determination of the question of consideration depends upon the settlement of the affairs of a partnership, some of the members of which are not before the court, it is a question for equitable jurisdiction. *Id.*
3. CONTRACTS — TIME NOT OF THE ESSENCE.—Time is not of the essence of a contract to convey real estate, in the absence of any express provision. *Martindale v. Waas et al.*, 108

CONTRACT — continued.

4. **SAME — CONCURRENT CONDITIONS.**— When, in an agreement for the sale of real estate, the same day has been fixed for the payment of the money and the delivery of the deed, the two sides of the contract will be mutual and concurrent conditions. *Id.*
5. **SAME — TENDER OF PERFORMANCE.**— The expression of a willingness to give a deed is not a sufficient tender of performance where the agreement was to give a deed and also assign an interest in a lease. *Id.*
6. **CONTRACTS — SEVERAL PROMISES — SOME ILLEGAL AND THE OTHERS LEGAL.**— In a case where the consideration of a contract is tainted by no illegality, but some of the promises are illegal, the illegality of those which are bad does not communicate itself to, or contaminate, others which are good, except where, in consequence of some peculiarity in the contract, its parts are inseparable or dependent upon one another. *W. U. Tel. Co. v. B. & S. W. Ry Co.*, 130
7. **CONTRACTS IN RESTRAINT OF TRADE — DIVISIBILITY.**— A contract in restraint of trade is divisible, and when such a contract contains a stipulation which is capable of being construed divisibly, and one part thereof is void, as being in restraint of trade, whilst the other is not, the court will give effect to the latter, and will not hold the agreement to be void altogether. *Id.*
8. **ILLEGAL CONTRACT — RIGHTS OF PARTIES IN PROPERTY ACQUIRED THEREUNDER.**— A court of equity having jurisdiction of the parties to, and the subject matter of, an illegal contract, will not require one of such parties to give up what he has acquired under it without requiring the same of the other; and one of such parties will not be allowed to come into a court of equity, and, while retaining all that he has received under the contract, be permitted to retake also what he has parted with under it. Property accumulated under such a contract must, as between the parties, be disposed of according to equity, and a court will not refuse to deal with it upon the ground that it was acquired under an illegal contract. *Id.*
9. **CONTRACT OF SALE CONSTRUED — LEX LOCI CONTRACTUS — EVIDENCE — INADMISSIBILITY OF PAROL, TO ADD TO A WRITTEN CONTRACT — BURDEN OF PROOF — EXPERT TESTIMONY — MEASURE OF DAMAGES — COMPLIANCE — MEANING OF TRADE TERM — TENDER.** *Pope et al. v. Filley*, 190
10. **CONTRACT MADE ON SUNDAY — AFFIRMANCE ON A WEEK DAY.**— Affirmance on a week day of a contract of bargain and sale entered into on Sunday, and void for that reason, makes it valid. *Van Hoven v. Irish*, 443
11. **CONTRACT — CONSTRUCTION ADOPTED BY THE PARTIES THERETO.**— In cases where there is doubt as to the true meaning of a con-

CONTRACT — continued.

tract, the fact that the parties themselves who made it at once adopted a particular construction, and for many years acquiesced in and acted upon it, should lead a court to resolve its doubts in favor of the construction adopted by the parties. *Nickerson et al., Trustees, v. Atchison, etc., R. Co.*, 455

12. CONTRACT — PUBLIC OFFICER — LOCAL STATUTE — NON-RESIDENT.

When a party in one state makes a contract with direct reference to the law of another state, he must be held to know the law of the latter state, and to have direct reference thereto. The former ruling in this case, reported in 2 McCrary, 152, concerning liability of defendants as officers of Marion county for a reward offered for the apprehension of public offenders, reaffirmed. *Huthsing v. Bosquet et al.*, 569

CONTRIBUTORY NEGLIGENCE. See *Negligence*, 2.

CONVERSION. See *Warehouse*, 4.

CONVEYANCE. See *Trust*, 1.

CORPORATION. See *Equity*, 1.

1. STATUTE CONSTRUED — CITIZENSHIP OF CORPORATION — JURISDICTION.—

Under a statute of Nebraska, declaring that any railroad company organized under the laws of Kansas, Missouri or Iowa, may extend its line of railroad into Nebraska, and file its articles of incorporation with the secretary of state, and shall thereupon become a legal corporation of that state, and entitled to all the rights, privileges and franchises of railroad companies organized under and pursuant to the laws of Nebraska: *Held*, that a railroad company organized under the law of Iowa, having extended its line into Nebraska, and filed its articles of incorporation with the secretary of state of that state, became, for jurisdictional purposes, a citizen of Nebraska as to all transactions of the company in that state. *Stout v. Sioux City, etc. R. Co.*, 1

2. SAME — SAME — CITIZENSHIP.— All questions of jurisdiction depending upon the citizenship of the parties to the suit must be determined by their citizenship at the time of the commencement of the suit. *Id.*

3. CORPORATIONS — HOW CREATED.— It is competent for the state, by its legislation, to determine the mode of creating corporations within its limits, and it may, therefore, declare that a foreign corporation shall become a corporation of the state by building a railroad therein and filing a copy of its articles of incorporation with the secretary of state. *Id.*

4. FOREIGN CORPORATION — CONSENT TO BE SUED.— A corporation created by one state may consent to be sued in another, in con-

CORPORATION — continued.

sideration of its being permitted by law to exercise therein its corporate powers and privileges. But this doctrine does not apply to a foreign railroad corporation extending its line into Nebraska, under the statute above named. *Id.*

5. **SAME — AGENT.**— Where, under the statute above named, it appeared that the railroad through both states was operated by one management, *held*, that the officers and agents of said corporation in Nebraska were officers and agents of the Nebraska corporation in respect to all its transactions within that state. *Id.*
6. **POWER OF STATE OVER CORPORATION.**— It is the right of each state in which a corporation transacts business to require it to become a corporation of the state under and by virtue of its own laws. *Id.*
7. **CORPORATIONS — FRAUDULENT ASSIGNMENT OF ASSETS — SUBROGATION — PLEADINGS — PARTIES.**— Where one corporation, after contracting debts, fraudulently transfers to another corporation all of its property, the latter having notice of the indebtedness, *held*, that a suit in equity to obtain decree for a moneyed judgment against the latter may be maintained by a creditor of the former without first obtaining judgment at law. *Held* further, that the president of the former corporation who caused the transfer to be made was not a proper party. *Hibernia Ins. Co. v. St. L. & N. O. Transp. Co.*, 368
8. **CORPORATION — JUDGMENT CREDITOR — ACTION AGAINST STOCKHOLDERS.**— A judgment creditor of a corporation, after execution returned unsatisfied, may maintain an action in his own behalf and in behalf of such other creditors of the corporation which may join him in a court of equity against the corporation and its delinquent stockholders, and have a decree that an account of the assets and debts of the corporation be taken, and that the stockholders pay in and account for so much as may be due from them respectively to the corporation on account of their capital stock, as will be sufficient to pay the debts represented by the complainants and other creditors joining them. *Holmes et al. v. Sherwood et al.*, 405
9. **CORPORATIONS — CONTRACTS.**— Where a railroad company made a contract concerning all roads which it then did or might thereafter control, by ownership, lease, or otherwise, and thereafter acquired more than a majority of the stock of B., another railway company, and by voting such stock elected B.'s board of directors; and where certain persons were members of the board of directors of both A. and B., and the same persons were respectively presidents and vice-presidents of both companies: *Held*, that A. had not acquired "control" of B. within the meaning of

CORPORATION — continued.

the terms of the contract, and that the word "control," as used in said contract, meant an immediate or executive control exercised by the officers and agents chosen by and acting under the direction of A.'s board of directors. *Pullman Pal. Car Co. v. Mo. Pa. R. Co.*, 645

10. CORPORATIONS — DISSOLUTION — CREDITORS — R. S. MO. § 744. — Section 744 of the Revised Statutes of Missouri requires a *pro rata* distribution of assets of dissolved corporations among their creditors, where such assets will not suffice to pay all demands in full. *Horner v. Carter et al.*, 595

11. SAME. — Where the president and directors of a dissolved corporation divide its assets among the stockholders, or appropriate them to their own use, and leave a debt due from the corporation unpaid, the party to whom this debt is due cannot maintain an action at law against such president and directors, under said section of the Missouri statutes, unless (1) the amount due such creditor has been previously ascertained in proceedings in equity; or (2) this demand is the only one which existed against the corporation at the time of its dissolution, and the assets received by the president and directors equalled or exceeded it in amount.

Id.

12. SAME — PLEADING. — Unless the petition avers one or the other state of facts it will be demurrable. *Id.*

13. SAME. — Whether the facts out of which the dissolution of the corporation resulted should not be averred, *quære*. *Id.*

COSTS.

1. COSTS — CLERK'S FEES. — The clerk may collect his costs as they accrue, irrespective of the final result. *Cavender v. Cavender*, 388

2. SAME. — A transcript of a record on appeal, or writ of error, is only a *copy*, and the clerk can charge therefor only ten cents per folio. *Id.*

3. SAME — EXPENSES. — For binding or express charges the clerk may charge the *reasonable, actual* cost to him. *Id.*

4. SAME. — The clerk cannot tax costs for drawing a bond and its approval when it was drawn by counsel and approved by the court. *Id.*

5. SAME — FOLIO, WHAT. — An original entry, distinct from all others, though less than a folio (one hundred words), is to be charged as a full folio. Appellant must pay costs incident to his appeal. *Id.*

COUNTERFEITING. See *Constitutional Law*, 3.

COUNTY WARRANTS. See *Notice*, 1.

COUPON TICKET. See *Common Carrier*, 19.

COURTS. See *Jurisdiction*, 1, 9, 10.

CREDITOR. See *Assignment*, 4. *Corporation*, 8, 10. *Deed*, 4.

CREDITOR'S BILL. See *Equity*, 19.

CRIMINAL LAW.

1. **CRIMINAL LAW—FALSE RETURNS BY POSTMASTERS—ACCESSORIES—ACT OF JUNE 30, 1879.**—One who aids and abets a postmaster in committing the offense provided against by the provisions of the act of June 30, 1879, which declares that a postmaster making a false return shall be deemed guilty of a misdemeanor, etc., is guilty of the same offense, and liable to the same punishment, as his principal. *United States v. Snyder*, 377

DAMAGES. See *Admiralty*, 3. *Riparian Rights*, 1.

1. **AMOUNT OF DAMAGES.**—When there is reason to believe the amount returned by the jury is larger than the reasonable value of the property, plaintiff may be required to elect between an abatement of part thereof or submit to a new trial. Electing to abate, a new trial will not be ordered. *Marsh v. Union Pacific R. Co.*, 237
2. **DAMAGES—AMOUNT OF.**—The verdict will not be set aside for "excessive damages" when it is not apparent that the jury acted from prejudice or passion, or that they passed the limits of fair discretion on the evidence. *McGowan v. La Plata M. & S. Co.*, 393

DEBTOR AND CREDITOR. See *Deed*, 4.

DECREE. See *Equity*, 1, 2.

1. **DECREE—EFFECT OF THE RECORD.**—All the parties to a suit in chancery are bound to know what is done in the case and spread upon the record; and after the rendition of decree, they cannot be heard to complain upon the ground that they were not advised of the contents of such decree in time to have taken an appeal therefrom or instituted other measures for setting aside and reversing the same. *Taylor et al. v. Charter Oak L. Ins. Co.*, 484

DEED. See *Revenue*, 4.

1. **DEED—BOUNDARIES IN.**—Though a deed does not describe the property conveyed by metes and bounds, yet if it makes reference to a location certificate of record which contains a full and definite description of the claims, this is the same as if the description had been given at length in the deed. It matters not that the location certificate be not shown to be regular in all respects, if it gives a correct description of the property. *Harris v. Equator Mining & S. Co.*, 14

DEED — continued.

2. **DEED AND CONSIDERATION IN ESCROW.**— Defendant purchased certain lands from plaintiff, for which he was to give him his note for the purchase price, to be delivered to a third party to be held in escrow till paid by defendant and till a warranty deed should be executed by the plaintiff, and be deposited in escrow with said third party to be delivered to the defendant. The note matured and was not paid, and plaintiff deposited a deed, executed by the proper parties, with said third party, as agreed upon, but the description of the land in the deed did not correspond with that mentioned in the agreement of sale. In an action by plaintiff on the note, it was *held* that there was no consideration and no delivery of the note to the plaintiff, for the reason that the condition of the contract had not been completed by the delivery of a deed for land described in the contract. *Glover v. Chase*, 599
3. **SAME.**— The party holding the note and deed in escrow was not the plaintiff's agent, but if plaintiff had deposited a deed with him for the land described in the contract, the defendant could not prevent a recovery by plaintiff notwithstanding the note was in possession of a third party and he had failed or refused to deliver it. Such party would be recognized as the agent of plaintiff. *Id.*
4. **DEBTOR AND CREDITOR — COMPOSITION DEED.**— A composition deed to which some of the signatures have been procured by a payment of more than their *pro rata* shares to the signers is invalid. *Brownsville Manuf'g Co. v. Lockwood*, 608

DEFAULT.

1. **JUDGMENT BY DEFAULT — BILL TO OPEN — DILIGENCE IN DEFENDING — WRITING TO AN ATTORNEY NOT ENOUGH.**— A party sued and regularly served with summons must use due diligence to make his defense; and it is not enough for him to show, in order to set aside a judgment against him by default after the term, that he wrote to a lawyer to defend the case, but paid no fee, and received no answer to his letter. *School Dist. No. 13, Sherman Co. v. Lovejoy*, 558

DEMAND. See *Negotiable Instruments*, 3.

DEMURRER. See *Pleading*, 5. *Practice*, 4.

DEPOSITION. See *Evidence*, 4.

1. **DEPOSITIONS — DISMISSAL OF CAUSE — NEW SUIT.**— Held accordingly, that where the plaintiff in a suit in a state court took certain depositions, and after the taking thereof dismissed his suit and brought a new action, which action was removed to the federal court, depositions taken in the first suit were admissible in

DEPOSITION — continued.

evidence upon the trial of the cause in the federal court, in accordance with the state law applicable to such cases. *Gravelle v. Minn. & St. L. R'y Co.*, 885

DIKES. See *Riparian Rights*, 1.

DILIGENCE. See *Default*, 1.

DISCLOSURE. See *Attorney*, 6.

DISCOVERY. See *Mining Claim*, 4.

DISCRETION OF COURT. See *Practice*, 8.

DISCRIMINATION. See *Common Carrier*, 2.

DISMISSAL. See *Deposition*, 1.

DISSOLUTION. See *Corporation*, 10.

DISTRIBUTION OF ESTATE. See *Jurisdiction*, 12.

DIVISIBILITY OF CONTRACTS. See *Contract*, 7.

DUAL CONTROVERSY. See *Jurisdiction*, 4.

EJECTMENT. See *Mining Claim*, 1. *Revenue*, 4.

1. **EJECTMENT OF RAILWAY COMPANY FROM RIGHT OF WAY.**—If the owner of land has licensed a railway company to take the same for right of way, and has permitted it to expend money in constructing its road for a period of ten or twelve years, he is estopped, and cannot now be permitted to eject the company. *Pryzbylowicz v. Mo. Pa. R. Co.*, 586

ELECTION OF REMEDY. See *Assignment*, 3.

ELEVATOR. See *Lease*, 5.

EMPLOYER AND EMPLOYEE. See *Master and Servant*, 1. *Negligence*, 4. *Railroad*, 2.

EQUITABLE ASSIGNMENT. See *Assignment*, 1, 2.

EQUITABLE OWNERSHIP. See *Vendor's Lien*, 1.

EQUITY. See *Jurisdiction*, 9. *Pleading*, 4. *Warehouse*, 3.

1. **EQUITY — DECREE — FINALITY — CORPORATION — BONDHOLDERS.**—A decree in a suit in equity brought to foreclose a mortgage given to secure certain bonds, and in which suit the bondholders were represented by their trustees, is conclusive upon the bondholders, especially where the bondholders were cognizant of the proceedings, appeared in the cause, and sought and obtained certain orders therein, and were heard from time to time upon questions affecting their interests. *Huntingdon et al., Trustees, v. L. R. & Ft. S. R. Co. et al.*, 581

EQUITY — continued.

2. **FINAL DECREES — HOW MODIFIED OR SET ASIDE.**— Final decrees in equity may be modified or set aside, (1) by appeal within the time prescribed by law; (2) by bill of review filed within the time allowed by law for appeal, charging error apparent upon the face of the record; (3) by original bill charging fraud or newly discovered evidence. *Id.*
3. **EQUITY — RELIEF, WHEN REFUSED — DISPUTED EQUITABLE CLAIM.**
Where the relief sought is founded upon a disputed equity, a court of equity will with great reluctance and hesitation take the possession from a defendant holding a clear legal title. So, where none of the actual holders of the stock or bonds of a railroad company who would be affected similarly with the plaintiff were before the court, the court ought to hesitate before appointing a receiver, on the ground of a possible injury to one holding nothing more than a disputed equitable claim for deferred stock. *Overton, Trustee, v. M. & L. R. R. Co.,* 436
4. **SAME — RECEIVER, WHEN NOT APPOINTED.**— It is not the province of a court of equity to take possession of the property and conduct the business of corporations or individuals, except where the exercise of such extraordinary jurisdiction is indispensably necessary to save or protect some clear right of a suitor, which would otherwise be lost or greatly endangered, and which cannot be saved or protected by any other action or mode of proceeding. *Id.*
5. **REMEDY IN EQUITY.**— Although a remedy at law may be provided by statute against an individual stockholder to enforce contribution, yet a federal court of equity is not thereby deprived of its jurisdiction to entertain a bill filed against numerous stockholders for discovery, account and contribution against them all. *Holmes et al. v. Sherwood et al.,* 405
6. **REHEARING IN EQUITY — NEWLY DISCOVERED EVIDENCE.**— Questions once fully litigated will not be opened for rehearing, for the purpose of re-examining witnesses once examined, nor to admit evidence that is merely cumulative. *Rogers v. Marshall et al.,* 76
7. **EQUITY JURISDICTION OF FEDERAL COURTS.**— The equity jurisdiction of the circuit courts of the United States is derived from and defined by the constitution and laws of the United States, is the same in all the states, and is not affected or varied by the statutes of the states regulating and defining the chancery powers and jurisdiction of the state courts. *Strettell v. Ballou et al.,* 46
8. **EQUITY PLEADING — FRAUDULENT CONVEYANCE — CONSIDERATION.**
A bill in equity brought to set aside a conveyance of real estate fraudulently executed, and which avers that the conveyance

EQUITY — continued.

was without any consideration, is sufficient; but if the bill admits that there was a consideration paid for such conveyance, it is necessary to aver an offer to return the same. *D. M. & M. R. Co. v. Alley et al.*, 589

9. **SAME — SAME.**— In such a case it is necessary to aver either that the conveyance was wholly without consideration, or that there was a consideration which the complainant has offered to return, or that the complainant is not informed, and has no means of ascertaining, whether there was a consideration, and what the value of the consideration was, if there was any, and that these fact are peculiarly within the knowledge of the respondent. *Id.*
10. **EQUITY PLEADING — ANSWER — FAILURE TO DENY.**— Where an answer in chancery neither admits nor denies the allegations of the bill, and is not excepted to, the allegations of the bill must be proved. *Rogers v. Marshall et al.*, 76
11. **EQUITY PLEADING.**— *Semble* that a bill to set aside a conveyance by the bankrupt, on the ground of fraud, is demurrable in the absence of any allegation that the fraud was discovered within the time prescribed by the statute. *Lichtenauer, Assignee, v. Cheney et al.*, 119
12. **EQUITY PLEADING — IN WHAT CASES AN AFFIDAVIT OF LOSS OF PAPERS MUST BE FILED.**— Where resort is had to a court of equity instead of a court of law, upon the ground that the instruments upon which the action is founded have been lost, destroyed or suppressed, it is necessary to annex to the bill an affidavit that such instruments are not in the custody or power of the complainant, and that he knows not where they are, unless in the hands of the defendant. But the present case does not come within that rule. *Holmes et al. v. Sherwood et al.*, 405
13. **BILL IN EQUITY TO SET ASIDE FRAUDULENT CONTRACT — LACHES.** A bill brought to set aside as fraudulent certain transactions and contracts made by complainants in ignorance of the fraud, and which alleges that some of the fraudulent acts “were not discovered until within a few weeks last past,” and others “within the three months last past,” does not affirmatively show that complainant has been guilty of laches. *N. P. R. Co. v. Kindred, Power et al.*, 627
14. **SAME — SAME — BURDEN OF PROOF.**— It is true that even within this short period of time, the complainant, by its acts or declarations, may have confirmed the contract, but if so, the fact must be pleaded as a defense and established by proof. Equity will not presume a ratification by the defrauded party if he files his bill with reasonable promptness. *Id.*

EQUITY — continued.

15. **BILL IN EQUITY — PARTIES.**— The persons who are used as instruments to take the title for the agent, in such a case, and to convey it as he may direct, and who have conveyed as directed by him, are not necessary parties unless some relief is sought as against them. *Id.*
16. **SAME — MULTIFARIOUSNESS.**— A bill which charges a fraudulent combination among several persons to commit a fraud, and specifies numerous separate transactions all entered into in pursuance of the general fraudulent scheme, is not multifarious. *Id.*
17. **SAME — GENERAL ALLEGATIONS OF FRAUD.**— Fraud must be specifically alleged, but general allegations introduced as a foundation for a future application to amend upon obtaining more specific information, are not demurrable. *Id.*
18. **BANKRUPTCY — EQUITY PRACTICE — AMENDMENTS UNDER EQUITY RULE 29.**— Amendments, regularly made under equity rule 29, cannot be avoided by a motion to strike from the record, or set aside, the order allowing them. *Lichtenauer, Assignee, v. Cheney et al.,* 119
19. **EQUITABLE RELIEF — TWO MUNICIPAL CORPORATIONS FORMED OUT OF ONE — CREDITOR'S BILL.**— The rights of creditors of the city of Duluth considered, with reference to the act of the legislature of the state of Minnesota, by which the village of Duluth was created out of a part of the territory of the city of Duluth, and the indebtedness of the city apportioned between them, and the allegations of fact in plaintiff's bill, and *held*, that such act — such allegations being true — interferes with the rights of creditors, and that a bill in equity will lie, by a creditor of the city at the time the act was passed, against the village, to enforce the payment of its proportionate share of the indebtedness; the share of the indebtedness for which each is liable being in the ratio of the taxable property of one to that of the other. *Brewis v. City of Duluth, etc.,* 219
20. **SAME — RIGHTS AGAINST ORIGINAL CORPORATION.**— Where a city creates a debt, and is thereafter by statute deprived of a part of its territorial extent by carving a new town or city out of the old, the old corporation remains liable for its debt, and must enforce it against the property left subject to its power of taxation; and while it is true that where the debtor corporation is shorn of population and taxable property to such an extent that it cannot pay its debts, a court of equity may enforce payment by the new corporation carved out of the old, yet if the latter remains able to pay, the creditor must proceed against it alone, unless the law otherwise provides. *Id.*

ESCROW. See *Deed*, 2.

ESSENCE. See *Contract*, 8.

ESTATE. See *Jurisdiction*, 12. *Mining Claim*, 3.

ESTOPPEL. See *Mining Claim*, 7. *Letters Patent*, 1.

1. **REAL PROPERTY — ESTOPPEL.**— Where A. erected one wall of an expensive building upon land to which he believed he had good title, but which was really owned by B., and B., with full knowledge of the fact that said wall was being erected, failed to claim any interest in the land or make any objection to the erection of said wall thereon, *held*, that he was thereafter estopped to claim title to the ground upon which the wall stood. *Walker v. Flint et al.*, 507

2. **ESTOPPEL — LICENSE TO USE LAND AS RIGHT OF WAY FOR RAILROAD.**— The owner of land which has been taken by a railroad for its right of way may by his own act estop himself from demanding actual payment of the compensation as a condition precedent to the taking and using of the same. This may be done by license either express or fairly implied; and such license will be implied if the owner expressly consents, or with full knowledge of the taking makes no objection, but permits the corporation to enter upon, expend money, and carry into operation the purposes for which it is taken. *Pryzbylowicz v. Mo. Pa. R. Co.*, 586

EVIDENCE. See *Contract*, 1, 9. *Equity*, 6. *Notice*, 5. *Pleading*, 3. *Practice*, 4. *Warehouse*, 1.

1. **EVIDENCE — WITNESSES — PRINCIPAL AND AGENT — IMPLIED AUTHORITY — AFFIRMATIVE AND NEGATIVE TESTIMONY.** *Cable v. Paine & Co.*, 169

2. **SAME — LETTER PRESS COPIES.**— The exclusion of letter-press copies, though no notice to produce the originals had been given, *held* to be sufficient reason for a new trial, where the trial was before a judge, temporarily assigned, and where it is insisted that a rule had been established in the district, with the concurrence of all the judges, making them admissible in evidence without such notice. *Id.*

3. **EVIDENCE — HOW VALUE OF HOUSEHOLD GOODS TO BE PROVEN.**— In such an action the plaintiff is a competent witness to testify as to the value of the goods, though he may not know the market value of such goods at the place of delivery. Perhaps the best way to arrive at the value of such goods would be to show the price in the market of new goods of the same character, and then show, as nearly as possible, the extent of depreciation from use. But such course is not open to a plaintiff when the defendant retains possession of the goods. In the matter of values, as in other matters, the law will give relief according to

EVIDENCE—continued.

the injury, on the best testimony that can be obtained. *Marsh v. U. P. R'y Co.*, 286

4. EVIDENCE—STATE STATUTE FOLLOWED AS RULE OF DECISION.—

Sec. 29, ch. 73, statutes of Minnesota concerning depositions, must, under sec. 721 of the Revised Statutes of the United States, be followed in the federal courts in actions at law as a rule of decision. *Gravelle v. M. & St. L. R. Co.*, 385

EXEMPTION. See *Taxation*, 2.

EXPENSE. See *Costs*, 3. *Trust*, 3.

EXPERT TESTIMONY. See *Contract*, 9.

EXPRESS. See *Common Carrier*, 1, 2, 5, 8, 9.

1. EXPRESS BUSINESS DEFINED.—The express business is a branch of the carrying trade, the object of which is to carry small and valuable packages rapidly and safely. *Express Cases*, 147

FALSE RETURN. See *Criminal Law*, 1.

FEDERAL COURTS. See *Equity*, 7. *Jurisdiction*, 13. *Practice*, 2.

FEE—LAND. See *Right of Way*, 1.

FEES. See *Attorney*, 1. *Costs*, 1, 2, 3, 4, 5.

FEEBLE MIND. See *Assignment*, 5.

FELLOW SERVANT. See *Negligence*, 3.

FENCE. See *Railroad*, 4.

FINALITY. See *Equity*, 1.

FOLIO. See *Costs*, 5.

FORECLOSURE. See *Chattel Mortgage*, 1. *Homestead*, 3.

1. FORECLOSURE SALE—INNOCENT PURCHASER.—Upon the facts stated in this case, the purchaser of the railroad at foreclosure sale did not acquire title to the telegraph line and property; he was not an innocent bona fide purchaser thereof, for value, without notice. *W. U. Tel. Co. v. B. & S. W. R'y Co.*, 130

FORFEITURE. See *Lease*, 1.

FRAUD. See *Practice*, 5, 6. *Principal and Agent*, 1. *Equity*, 17.

1. FRAUD—SALE OF GOODS.—Where a debtor sold his entire stock of goods to a purchaser with the intent to defraud his creditors, a full consideration paid by such purchaser will not protect him if he has notice, actual or constructive, that the vendor is selling to hinder and delay his creditors. *Singer, Baer & Co. et al. v. Jacobs et al.*, 688

FRAUD — continued.

2. **SAME — NOTICE OF FRAUD.**— When the facts and circumstances are such as to put a reasonable man on inquiry, that obligation is not satisfied by an inquiry addressed to the chief actor in the suspected fraud, who has every motive for concealing the truth, when better and reliable sources of information are open to him.

Id.

3. **SAME — CONSTRUCTIVE NOTICE — AVOIDING SALE.**— To avoid a sale made to defraud creditors, it is not required that the purchaser should have actual knowledge of the fraudulent purpose of the vendor. It is sufficient if he had constructive notice. *Id.*

FRAUDULENT ASSIGNMENT. See *Corporation*, 7.

FRAUDULENT CONTRACT. See *Equity*, 18, 14.

FRAUDULENT CONVEYANCE. See *Trust*, 1. *Equity*, 8, 9.

1. **FRAUDULENT PURCHASES — ASSIGNEES.**— Where a vendee is insolvent at the time a purchase is made, and does not expect to be able to pay for the goods purchased, the vendor is entitled to possession as against such a vendee's voluntary assignee. *Davis et al. v. Stewart, Assignee*, 174

GAMING LAWS.

1. **GAMING LAWS — R. S. MO. §§ 5722-3 — OPTION DEALS — NEGOTIABLE INSTRUMENTS.**— An option deal is not a "gaming or gambling device," within the meaning of the Missouri statutes, and a note given for a balance due on such a deal may be enforced by a *bona fide* holder for value, without notice, if indorsed to him before maturity. *Third Nat. Bank v. Harrison et al.*,

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GARNISHEE. See *Attachment*, 1.

GOVERNMENT. See *Indian Country*, 1, 2.

GRANT. See *Railroad*, 1,

GRUB STAKE. See *Mining Claim*, 8. . . .

HOMESTEAD.

1. **HOMESTEAD — ALIENATION — RIGHTS OF WIFE — MORTGAGE.**— Under the constitution and statutes of Kansas, the homestead cannot be alienated without the joint consent of husband and wife, when that relation exists, and a mortgage executed by the one without the concurrence of the other is void. *Hannon, Executor, v. Sommer*, 126
2. **SAME — MORTGAGE BY HUSBAND AFTER DEATH OF THE WIFE. — RIGHTS OF MINOR CHILDREN.**— The minor children have the right to use and occupy the homestead after the death of one of the parents, and this right cannot be interfered with by a mortgagee

HOMESTEAD — continued.

who claims under a mortgage executed by the husband and father; but, subject to this right in the minor children, the husband may, after the death of the wife, execute a valid mortgage upon the undivided half of the property occupied as a homestead, and the title to which was vested in the wife at the time of her death. Under the statute of Kansas, the husband inherits one-half of the estate of which the wife died seized. *Id.*

8. **SAME** — **RIGHT OF FORECLOSURE**. — After default, the mortgagee is entitled to a foreclosure of the mortgage upon the undivided half of the homestead, and to have a decree for a sale of the same, subject, however, to the right of occupancy of the whole of the premises by the minor children, whose rights are not to be affected by the mortgage, decree or sale. *Id.*

HOLDING OVER. See *Official Bonds*, 1.

IMPLICATION. See *Master and Servant*, 1. *Statute*, 5.

IMPLIED AUTHORITY. See *Evidence*, 1.

INDIAN COUNTRY.

1. **GOVERNMENT** — **INDIAN COUNTRY**. — Section 1 of the act of congress of June 30, 1834 (4 St. at Large, 729), defining the "Indian country" as "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river and not within any state, to which the Indian title has not been extinguished," was repealed by section 5596, R. S., and consequently the description of the "Indian country" found in section 1 of the act of 1834 is no longer a part of the law of the land. The question as to what is the Indian country, since the repeal of said section, not decided. *Pelcher et al. v. United States*, 510
2. **SAME** — **SEIZURE OF LIQUORS**. — A search for and seizure of liquors under the provisions of section 2140, R. S., which provides for the enforcement of a penalty and forfeiture for introducing spirituous liquors and wines into the Indian country, in a case where the liquors found were not claimed to have been seized within the limits of an Indian reservation, was *held* unauthorized. *Id.*

INDICTMENT. See *Preventing Citizen from Voting*, 1, 2.

1. **INDICTMENT** — **INFORMATION** — **TRANSFER FROM DISTRICT TO CIRCUIT COURT** — **STATUTE CONSTRUED**. — A criminal proceeding commenced in the district court cannot be remitted for trial to the circuit court under the provisions of section 1087 of the Revised Statutes of the United States. *United States v. Tierney*,

INFAMOUS CRIMES. See *Constitutional Law*, 1, 2, 3.

INFANCY. See *Insurance*, 7.

INFLUENCE. See *Assignment*, 5.

INFORMATION. See *Constitutional Law*, 2, 3. *Indictment*, 1.

INFORMER. See *Internal Revenue*, 2.

INFRINGEMENT. See *Letters Patent*, 3, 4.

INJUNCTION. See *Bill of Review*, 2.

1. **INJUNCTION TO RESTRAIN PROBATE COURT.**—This court will not restrain an executor, appointed by a probate court in Nebraska, from attempting to take possession of the estate, nor will it restrain the probate court itself from proceeding. *Freemay et al. v. First Nat. B'k of Plattsmouth et al.*, 622

INNOCENT PURCHASER. See *Foreclosure*, 1.

INSOLVENCY. See *Trusts*, 2.

INSURANCE.

1. **LIFE INSURANCE—POLICY PAYABLE TO DEVISEES CONSTRUED.**—Where the contract between a benevolent aid association and its individual members is for the payment, upon the death of a member, of a sum of money to his devisees, and such member dies intestate, the administrator is not entitled to recover such amount from the association. *Worley v. Northwestern Masonic Aid Association*, 53
2. **INSURANCE—SEPARATE RISKS UPON SAME PROPERTY—LAWS—MEASURE OF LIABILITY.**—Where several insurance companies take separate risks upon the same property, and a loss occurs, the companies are liable in the ratio that their risks bear respectively to the total risk. *Barnes et al. v. Hartford Fire Ins. Co.*, 226
3. **INSURANCE POLICY—RIGHT OF ACTION ON.**—O. obtained from defendant insurance on certain premises, the policy containing this provision: "Loss, if any, payable to T., as his interest may appear"—O. being at the time indebted to T., and this indebtedness being secured by trust deed upon the premises covered by the insurance. The premises were destroyed by fire, and T. filed his complaint, demanding judgment on the policy against the insurance company which issued it. Defendant demurred. *Held*, that O., being the owner of the policy, is alone entitled to sue on it; T. has no right of action, and the complaint is bad on demurrer. *Thatch v. Metropole Ins. Co.*, 387
4. **INSURANCE—LIMITATION OF TIME WITHIN WHICH SUIT MAY BE BROUGHT.**—A condition in a life policy that no suit shall be

INSURANCE — continued.

- brought upon it unless brought within one year after the assured's death, is valid. *O'Laughlin v. Union Cent. Life Ins. Co.*, 548
5. **SAME.**— A suit cannot be maintained upon a policy containing such a condition unless instituted within the time specified. *Id.*
6. **SAME — PLEADING.**— Where suit is not instituted within the time specified, the condition need not be specially pleaded as a defense. It is sufficient to deny that the conditions of the policy have been complied with. *Id.*
7. **SAME — INFANCY.**— The fact that the beneficiaries named in the policy are minors will not prevent the enforcement of such a condition. *Riddlesbarger v. Hartford Ins. Co.* 7 Wall. 386. *Id.*
8. **INSURANCE — APPLICANT MUST ACT IN GOOD FAITH.**— A party applying for insurance is bound to answer questions concerning facts material to the risk truthfully. *Fletcher v. N. Y. L. Ins. Co.*, 608
9. **APPLICATION — PRESUMPTION AS TO KNOWLEDGE OF CONTENTS.**— Every one who signs an application for insurance is presumed to know its contents. *Id.*
10. **SAME — RULE WHERE IT CONTAINS FALSE ANSWERS.**— Where the application for insurance contains false answers concerning facts material to the risk, no suit can be maintained upon the policy issued to the applicant, unless it can be shown that the applicant's answers were true; that the false answers were inserted by an agent of the insurance company without the applicant's knowledge; and that the applicant signed the application under the impression that it contained his answers as given. *Id.*
11. **SAME — BURDEN OF PROOF.**— In such cases the burden of proving that the answers actually made by the applicant were true, and that he signed the application under the impression that they had been correctly reduced to writing, is upon the party seeking to enforce the policy. *Id.*

INTERNAL REVENUE.

1. **INTERNAL REVENUE LAW — COLLECTOR — PAYING MONEY UNDER DECREE OF COURT.**— Where a decree of forfeiture is rendered in a suit for a breach of the internal revenue law, and the defendant, pursuant to a compromise with the government, pays a sum of money into court, and A. and B. are adjudged entitled to a portion of the fund paid as informers, and the court makes a final order of distribution, and issues checks to C., collector of internal revenue of the district, and no appeal is taken, and C. pays A. and B. the amounts to which they have been held entitled, he cannot be held liable on his official bond for the amounts so paid, whether the informers are legally entitled thereto or not. *United States v. Krum, Adm'r, et al.*, 881

INTERNAL REVENUE — continued.

2. **SAME — INFORMER.**— Where money is paid into court under circumstances like those above stated, the right of the informers to their proportion of the sum paid is not affected by the fact that a part of such sum is designated to cover taxes. *Id.*
3. **INTERNAL REVENUE — SALE OF STAMPS — COMMISSIONS — STATUTE CONSTRUED.**— Under section 3425 of the Revised Statutes of the United States, commissions to purchasers of internal revenue stamps are to be paid in cash; and the same commissions are to be paid whether the purchaser pays cash for such stamps, or secures credit of sixty days and gives a bond as required by said section. *United States v. Fielding, Mansfield & Co. et al.,* 479
4. **SAME — SAME — SAME.**— The commissioner of internal revenue has no power to pay commissions in stamps at their face value. *Id.*

INTERVENORS. See *Removal*, 4.

JOINT ACTION. See *Action*, 1.

JOINT FEASORS. See *Removal*, 14.

JOINT LIABILITY. See *Attachment*, 2.

JOINT OWNER. See *Letters Patent*, 8.

JOINT WRONG. See *Practice*, 1.

JUDGMENT. See *Attorney*, 1. *Constitutional Law*, 5. *Default*, 1. *Set-off*, 1. *Trial*, 2.

1. **GEN. ST. MINN. CH. 77, § 1, AND CH. 53, § 19 — JOINT JUDGMENTS.**— By chapters 77, § 1, and 53, § 19, Gen. St. Minn., a joint judgment against the deceased and others, obtained during his life-time, may, upon his death, be prosecuted against his representative alone. *United States v. Spiel,* 107
2. **JUDGMENT IN SCIRE FACIAS — EFFECT OF, UPON PARTIES TO ORIGINAL SUIT.**— The main purpose of proceedings in *scire facias* under the statute of Missouri is to revive the judgment and thereby preserve the lien thereof upon real estate; and where a bankrupt was a party to the original judgment, his assignee in bankruptcy is not estopped by a judgment in *scire facias*, to insist that the judgment revived had been in part satisfied, especially in a case where he had no knowledge or notice of such partial satisfaction at the time that the judgment was revived, and could not by reasonable diligence have ascertained that fact. *Seay v. Wilson, Assignee,* 121

JUDGMENT CREDITOR. See *Corporation*, 8.

JURISDICTION. See *Corporation*, 1. *Equity*, 7. *Practice*, 5, 6. *Receiver*, 1, 2. *Removal*, 7. *Warehouse*, 8.

1. **PLEA TO JURISDICTION — ANSWER.**— Where defendant filed plea to jurisdiction, which was taken under advisement by the court, and at the same time left with the clerk an answer indorsed, "to be filed subject to the plea to the jurisdiction," *held*, that the answer was not filed in such a sense as to be a waiver of the plea. *Stout v. S. C. & St. P. R. Co.*, 1
2. **JURISDICTION — CONTROVERSY BETWEEN CITIZENS OF THE SAME STATE.**— Whenever the sole controversy, in a suit begun in a state court, but subsequently removed to a federal court, is one between citizens of the same state, the suit will be remanded, upon motion, to the state court from which it was removed. *Iowa Homestead Co. v. Des Moines Nav. & R. Co. et al.*, 95
3. **SAME.**— It seems that, after the suggestion of the court to dismiss that part of the bill praying that the amount due, etc., had been followed, the court no longer had jurisdiction of the case, and the motion to remand, made at that stage of the proceedings, should have been granted, and the petition of the intervenor to file a cross-bill should have been denied. *Id.*
4. **SAME — DUAL CONTROVERSIES — ONE BETWEEN CITIZENS OF THE SAME STATE UNITED IN SAME SUIT WITH AN ENTIRELY INDEPENDENT ONE BETWEEN CITIZENS OF DIFFERENT STATES — UNION OF, DUE IN NO WAY TO PLAINTIFF.**— Where the union of a controversy between citizens of the same state with an entirely independent one between the plaintiff and a third person, a citizen of a state other than that of the plaintiff, is due in no measure to the plaintiff, it seems that a federal court has no jurisdiction of the suit. *Id.*
5. **ACT OF 1875, § 2.**— *Quære*, whether this conclusion could be come to, upon a true construction of the second section of the act of 1875, without regard to the provisions of the constitution. The recent decision of *Barney v. Latham*, in the supreme court of the United States, distinguished. *Id.*
6. **JURISDICTION OF CIRCUIT COURTS — NATIONAL BANKS — REV. ST. § 629, SUBD. 10.**— Circuit courts have jurisdiction over suits by or against national banks without regard to the questions in controversy. *Third National Bank v. Harrison et al.*, 162
7. **SAME — REV. ST. § 740.**— Where there are two districts in a state a national bank may bring a suit, not of a local nature, in the circuit court of the one in which it is located, against two or more defendants, one or more of whom reside in the other district, if one of them resides in the district in which suit is brought. *Id.*
8. **COURTS — JURISDICTION — BANKRUPTCY.**— Where the jurisdiction of a United States district court over a cause depends upon the

JURISDICTION — continued.

fact that one of the plaintiffs is the assignee of a bankrupt whose estate is interested in the controversy, the court will cease to have jurisdiction if the interest of the estate ceases, and the cause is dismissed as to the assignee. *Moore et al. v. O'Fallon et al.*, 364

9. **COURTS OF EQUITY — JURISDICTION — PRACTICE — STATUTORY ACTIONS.**— Where the statutes of a state, in which the distinction between actions in chancery and suits at law is abolished, provide for a particular action, the question whether a federal court held in that state should regard that action, when brought before it, as legal or equitable, must depend upon the facts stated and the relief sought. If the suit appears to be in the nature of a suit in equity, it should go upon the equity calendar, and be proceeded with in accordance with the equity rules. *Duncan v. Greenwald*, 378

10. **SAME — SAME — ACTION TO QUIET TITLE.**— Courts of equity have jurisdiction over suits to quiet the title to real estate. *Id.*

11. **PROBATE OF WILL — JURISDICTION — STATUTE OF NEBRASKA.**— It is now the settled law of Nebraska that the county or probate court has original and exclusive jurisdiction in the probate of a will, and that its judgment and order in such a matter is final and conclusive unless appealed from. *Freenay et al. v. Bank et al.*, 622

12. **SAME — SAME — DISTRIBUTION OF AN ESTATE.**— While an estate is in the hands of the proper probate court for the purposes of administration, no other court can interfere with it for the purpose of distribution. *Id.*

13. **JURISDICTION — STATE AND FEDERAL COURTS.**— Where there is an ample and unquestioned remedy in the state court, while as to many of the matters complained of this court is without jurisdiction, and as to others the question of jurisdiction is doubtful, the court will refuse to proceed. *Id.*

JURY. See *Trial by Jury*, 1, 2, 3, 4, 5, 6. *Negligence*, 7.

LACHES. See *Attorney*, 1. *Equity*, 13, 14.

LAND GRANT. See *Railroad*, 1.

LEASE.

1. **LEASE — RE-ENTRY — FORFEITURE.**— The right of the lessor in a lease of real estate, to declare the lease forfeited, and thereupon, of his own motion, to re-enter the premises, is a very harsh remedy, and is to be restrained by the courts within narrow limits, and the lease is to be construed strongly in favor of the lessee, the court taking pains to see that no injustice is done. *K. C. Elevator Co. v. U. P. R. Co. et al.*, 463

LEASE—continued.

2. **SAME — TAXES AND RENTS.**— The law is well settled that a demand for the payment of taxes and rents is necessary as a condition precedent to the right of re-entry, where the lease provides for re-entry upon a failure to pay the same. *Id.*
3. **ASSIGNMENT OF LEASE — SUBLETTING.**— Where, by the terms of a lease, the lessee was to keep the property in his own hands, and where, during two or three months of the term, the property was turned over to a third party without the assent of the lessor, *held*, that the lessor waived this breach by acquiescing and by failing to object for a considerable period of time. *Id.*
4. **SAME — SAME.**— Where a lease upon an elevator and warehouse provided that the lessee should “not sublet said elevator and warehouse, nor assign or transfer this agreement without the written consent thereto of the superintendent of the party of the first part,” *held*, that the lessee might either sublet or assign with the assent of the officer named. *Id.*
5. **ELEVATOR — POOLING ARRANGEMENT — RE-ENTRY UNDER LEASE.**— What is known as the pooling arrangement entered into by the lessees in this case and set forth in the opinion, however immoral and improper it may have been, was not, according to the terms of the lease, sufficient to authorize the lessor to declare a forfeiture and re-enter the premises. *Id.*

LEGACY TAX.

1. **LEGACY TAX — BEQUEST OF AN ALIEN NON-RESIDENT TO ALIEN NON-RESIDENTS FOR LIFE, WITH REMAINDER TO RESIDENTS AND NON-RESIDENTS OF THE UNITED STATES — ACTS OF CONGRESS CONSTRUED — EFFECT OF REPEALING ACT OF JULY 14, 1870.**— An alien non-resident died in Ireland, July 18, 1870. By her will she bequeathed property, situated partly in Ireland and partly in Missouri, to A. and B., who were also alien non-residents, for the life of A., with remainder to alien non-residents and two resident citizens of the United States. Her will was probated in Ireland, and ancillary letters of administration were granted in Missouri, November 2, 1870. On October 13, 1877, A. and B. conveyed their interest to the remaindermen. At the time of the conveyance, the portion of the estate situate in Missouri was still in the American executor's hands. Suit being brought to recover a legacy tax upon the estate in his hands, it was *held* that, under the acts of congress prior to the repealing act of 1870, the taxes would not have accrued, if at all, until the beneficiaries entered into possession or enjoyment of the property, and that as said legatees did not enter into possession or enjoyment of their legacies before 1877, the property then in said executor's hands was exempted by the repealing act of

LEGACY TAX—continued.

1870 from the legacy tax imposed by the various prior acts. Whether or not the interests derived by either the foreign or American legatees as remaindermen were, under the facts stated, subject to a legacy tax, *quære*. *United States v. Rankin*, 118

LEGAL IMPLICATIONS. See *Master and Servant*, 1.

LETTERS PATENT.

1. **LETTERS PATENT — ASSIGNMENT — ESTOPPEL.**— An assignor of a patent, who had agreed to stop manufacturing the patented machines, and had paid a license fee, agreed upon, to his assignee for the privilege of selling machines he had on hand, is estopped from denying the validity of the patent, in a suit against him by the assignee for its infringement, by manufacture and sale under letters patent, issued subsequently to the assignment. *Consolidated Middlings Purifier Co. v. Guilden*, 186
2. **SAME — MIDLINGS PURIFIERS.**— Reissue No. 8,886, and letters patent No. 225,218, are substantially for the same machine. *Id.*
3. **INFRINGEMENT OF PATENT BY JOINT OWNER.**— A part owner of a patent has no right to use an infringing device. If he does he is liable to his co-owner for the wrong done. *Herring v. Gas Consumers' Association*, 206
4. **SAME — AMOUNT OF RECOVERY.**— When a part owner of a patent sues a co-owner for using an infringing device, the recovery, if any, will be in proportion to their respective interests. *Id.*
5. **LETTERS PATENT — MIDLINGS FLOUR.**— Certain instruments, set out in full in the opinion delivered by the court, *held* not to amount to such an assignment by Downton, a patentee for a process patent, of which the claim is for manufacturing midlings flour by passing the midlings through or between rolls, of his right as patentee, as to preclude him from suing third parties who infringe his patent. *Downton v. Yaeger Milling Co.*, 414
6. **LETTERS PATENT — EXTENDED TERM — STATUTE OF LIMITATIONS.**— Where suit was brought for an infringement of reissued letters patent, reissued in 1868, and a plea of the statute of limitations was interposed, *held*, (1) that the state statute did not apply; (2) that section 55 of the act of July 8, 1870, had not been repealed so as to relieve either party to the case from the federal limitation of six years after the expiration of the extended term. *Haywood et al. v. City of St. Louis et al.*, 314

LETTER PRESS COPIES. See *Evidence*, 2.

LEX LOCI. See *Contract*, 9.

LICENSE. See *Estoppel*, 2.

LIEN. See *Attorney*, 1. *Common Carrier*, 17. *Set-off*, 1. *Surety*, 2. *Vendor's Lien*, 1, 2, 3, 4.

1. **PROVING CLAIM IN BANKRUPTCY — LIENS — WAIVER.**— A creditor waives any lien he may have upon the property of his debtor, by proving up his debt as an unsecured claim. *White v. Crawford*, 412

LIFE INSURANCE. See *Insurance*, 1.

LIMITATIONS. See *Letters Patent*, 6. *Pleading*, 7.

LIQUORS. See *Indian Country*, 2.

LIS PENDENS. See *Vendor's Lien*, 4.

LOCAL PREJUDICE. See *Removal*, 5, 10.

LOCAL STATUTE. See *Contract*, 12.

LOCATION. See *Mining Claim*, 1, 4.

MAILS. See *Constitutional Law*, 2.

MASTER AND SERVANT. See *Negligence*, 3.

1. **EMPLOYER AND EMPLOYEE — CONTRACT — LEGAL IMPLICATIONS.**—

When a person enters into the service of another he assumes all the ordinary risks incident to the employment, and the employer agrees, by implication of law, not to subject the servant he employs to extraordinary or unusual perils or dangers, and that he will furnish the employee with reasonably safe and convenient machinery with which to perform his duties. *Gravelle v. M. & St. L. R'y Co.*, 352

2. **MASTER AND SERVANT — NEGLIGENCE — DUTY OF MASTER TO INFORM SERVANT OF DANGER INCIDENT TO OCCUPATION — PRESUMED KNOWLEDGE OF SERVANT AS TO SCIENTIFIC FACTS.**— The master is bound to inform his servant of facts within his knowledge affecting the safety of the servant in the service to be performed, when the latter is ignorant of the facts. The law will presume, within limits, that every one has knowledge of certain destructive forces in nature, and accepts employment with reference to them—as that fire will burn, water drown, the law of gravitation, etc. But many scientific facts tending to endanger life are not within the intelligence of ordinary men. A laborer employed to remove hot slag from a furnace in proximity to water will not be presumed to know the dangers which may result from the explosion sure to be caused by the contact of the hot slag and the water. It is not so much a question whether the party injured has knowledge of all the facts in his situation, as whether he is aware of the dangers that threaten him. *McGowan v. La Plata M. & S. Co.*, 393

MASTER AND SERVANT — continued.

3. **MASTER AND SERVANT — NEGLIGENCE.**— An employer who introduces, without notice to his employee, new and unusual machinery, whether belonging to himself or another, involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident, is liable in damages. *O'Neil v. St. L., I. M. & S. R'y Co.*, 423
4. **SAME — SAME — PLEADING.**— Where an accident occurs to a railroad employee in consequence of the introduction of a foreign and defectively-constructed car into the train on which he is employed, and he sues the railroad company for damages, he is not bound to allege in his petition that the accident was caused by the introduction of a foreign car. *Id.*

MEASURE OF DAMAGES. See *Admiralty*, 4. *Common Carrier*, 18, 16. *Contract*, 9.

MECHANIC'S LIEN. See *Surety*, 2.

MIDLINGS FLOUR. See *Letters Patent*, 5.

MIDLINGS PURIFIER. See *Letters Patent*, 1.

MINING CLAIM.

1. **MINING CLAIM — POSSESSION — LOCATION — EJECTMENT.**— Though plaintiffs, who sue in ejectment for the possession of a mining claim, may not be able to show a valid location according to the mining laws in force at the time, yet they may recover, if they can show that they were in possession, holding and claiming under color of title, at the time the defendant entered. And such recovery will extend to the entire claim, and not merely to the actual area occupied. *Harris et al. v. Equator M. & S. Co.*, 14
2. **PURCHASER AND LOCATOR — DISTINCTION BETWEEN.**— The purchaser of a mining claim may occupy a position different from the locator—not as against the general government, against which nothing can avail but strict compliance with the law regulating locations; but, against other citizens seeking to locate the same ground, it may well be said that a purchaser in possession under a conveyance regular in form is in by color of title, which in time, under the statute of limitations, will ripen into a perfect right. And it seems reasonable to allow him to maintain his possession against one who seeks only to initiate a new claim to the same thing. *Id.*
3. **ESTATE IN MINING CLAIM.**— The circumstance that a miner's estate in public lands is subject to conditions, on failure of which it will be defeated, is not controlling. In general, we apply to

MINING CLAIM — continued.

mines in the public lands the rules applicable to real property, as that it may be conveyed by deed, is subject to sale on execution, descends to the heir, and not to the administrator, etc. *Id.*

4. **DISCOVERY — LOCATION — TIME ALLOWED.**— Upon the discovery of a lode bearing silver in the public lands, a citizen is entitled to locate a full claim, and he has the time allowed by law to complete the location. *Erhart v. Boaro et al.*, 19

5. **NOTICE — HOW MADE.**— A notice posted at the point of discovery, specifying the nature and extent of his claim, will protect the locator's right for the time allowed by the law in which to complete the location, although he may be absent from the claim during part of such time. *Id.*

6. **SAME — MUST SPECIFY EXTENT OF CLAIM.**— But if he fails to specify, in his notice of discovery and claim to the ground, the extent of his claim, as that it extends a certain distance from the point of discovery in a direction named, it will relate only to the place where it stands. As against others afterwards locating in the vicinity, it will cover only ground necessary for sinking a shaft. *Id.*

7. **ESTOPPEL — TRESPASSER.**— One who goes on ground taken up by another for mining purposes during the temporary absence of the first locator, and excludes him therefrom, and thereby prevents the first locator from completing his title, shall not be permitted to allege any defect in that title. *Id.*

8. **PROSPECTING FOR MINES — "GRUB STAKE" — ARRANGEMENT MUST EXIST AT THE TIME OF DISCOVERY TO GIVE JOINT INTEREST.**— The partnership association, or association between parties who may be engaged in prosecuting explorations in the public lands for mines, must exist at the time of the location and discovery in order to give the parties, other than the discoverer, an interest in the property. *Johnstone v. Robinson et al.*, 42

9. **SAME — ABANDONMENT OF CONTRACT.**— A. made an agreement with B., by which the latter was to take care of the former for the winter, and furnish outfit in the spring, when A. should go prospecting on their joint account. B., at least partially, complied with the agreement by keeping A. for the winter and furnishing some money in the spring. But before making any discovery or search for mines under this arrangement, A. made a new arrangement with R., by which the latter furnished the "outfit," and the former did the prospecting; under this last arrangement the mines were discovered. *Held*, that the making of the arrangement with R. was an abandonment of the agreement with B., and the latter cannot share in the interests of A. in the property discovered and located under the new arrangement. *Id.*

MINING CLAIM — continued.**10. PARTITION OF MINING CLAIM — A MERE POSSESSORY INTEREST.—**

The holder of a mere possessory interest in land, not having title thereto, cannot maintain a bill for partition in the circuit courts of the United States. Such a bill must be filed by one having title to a portion of the premises sought to be partitioned. If a statute of the state authorizes such bill it must be filed in the state courts. *Strettell v. Ballou et al.*, 46

MOTIVE POWER. See *Common Carrier*, 11, 12, 13, 20, 21.

MORTGAGE. See *Chattel Mortgage*, 1, 2. *Homestead*, 1, 2. *Vendor's Lien*, 3.

1. **MORTGAGE — AFTER-ACQUIRED PROPERTY.—** As between the parties, it is well settled that the mortgagee, as to after-acquired property, takes only the interest of the mortgagor; and an agreement between the mortgagor and a third party, that personal property affixed to mortgaged real estate shall retain its character as personalty, is valid without the assent of the mortgagee. *W. U. Tel. Co. v. B. & S. W. Ry Co.*, 180

MULTIFARIOUSNESS. See *Equity*, 16.

MUNICIPAL BONDS.

1. **MUNICIPAL BONDS — RECITALS.—** Recitals in municipal bonds issued to aid in the construction of a railroad, stating compliance with all the conditions precedent prescribed by law, are conclusive evidence in favor of a purchaser of such bonds, without other information than that which appears on their face that such conditions precedent have been complied with. *Marshall et al. v. Town of Elgin*, 35
2. **RECOGNITION BY STATE COURT OF VALIDITY OF BONDS — SUBSEQUENT CHANGE OF RULING.—** If the law under which such bonds issued had been recognized as valid by the highest court of the state at the time, no subsequent act of the judiciary can impair their validity in the hands of innocent purchasers. *Id.*
3. **WHAT AMOUNTS TO A JUDICIAL RECOGNITION OF THE VALIDITY OF SUCH BONDS.—** Where a decision of the highest judicial tribunal of the state, at the time the bonds are issued, favors the validity of the law under which they are issued, a subsequent decision impairing their validity will not be followed by the federal courts. A decision construing and enforcing such a law will be regarded as one favoring its validity, although the question of its constitutionality was not discussed by the court, especially if that question be presented in argument by counsel. *Id.*
4. **ACT OF FEBRUARY 19, 1875, OF MISSOURI, CONSTRUED — MUNICIPAL BONDS — CONSTITUTIONAL LAW — INFRINGING THE OBLIGATION OF CONTRACTS.** *George v. Ralls Co. et al.*, 181

MUNICIPAL CORPORATIONS. See *Equity*, 19.

NATIONAL BANK. See *Jurisdiction*, 6.

NEGLIGENCE. See *Common Carrier*, 10, 14, 15, 16, 20, 21. *Master and Servant*, 2, 3, 4.

1. **NEGLIGENCE.**—Negligence is the failure to exercise that degree of caution which a man of ordinary intelligence would exercise under the circumstances of a particular case. *Gravelle v. M. & St. L. Ry Co.*, 852

2. **CONTRIBUTORY NEGLIGENCE—ACTION DEFEATED.**—In cases of personal injuries inflicted by railroad cars in motion, where the plaintiff's negligence contributed to his injuries, he cannot recover. *Id.*

3. **INJURIES THROUGH NEGLIGENCE OF A FELLOW-SERVANT.**—A railroad company is not liable for injuries inflicted on a person through the negligence of a fellow-servant of such person. Fellow-servants or co-servants, within this rule, are persons engaged in the same common service under the same general control. Where one servant is invested with control or superiority over another with respect to any particular part of the business, they are not, with respect to such business, fellow-servants within the meaning of the law. *Id.*

4. **NEGLIGENCE—RAILROAD EMPLOYEES.**—Employees in the service of a railroad company accept the ordinary hazards—such perils as are incident to the service. But a company is bound to have safe and suitable machinery, so as not to expose employees to unnecessary dangers, such as may be avoided by reasonable care in the construction of cars and other apparatus upon the road. Averments in complaint in such case. *Palmer v. D. & R. G. R. Co.*, 635

5. **NEGLIGENCE BY WAREHOUSEMAN—KEEPING POWDER IN WAREHOUSE.**—Putting a large quantity of powder in the same warehouse with plaintiff's goods was negligent conduct for which defendant is liable in damages to the extent of the loss resulting to plaintiff from the presence of such powder in the warehouse. *White v. Colo. Cent. R. Co.*, 559

6. **SAME.**—A fire occurring in defendant's warehouse where plaintiff's goods were stored, there being a large quantity of powder in the same, if the firemen who resorted to the place for the purpose of extinguishing the fire were, by the presence of the powder in the house, hindered and prevented from saving plaintiff's goods, the powder may be regarded as the proximate cause of the loss. *Id.*

7. **SAME—STORING POWDER IN WAREHOUSE—JURY.**—In such a case the question of negligence is not for the jury, and the court

NEGLIGENCE — continued.

may declare that the storing of powder in the same house with plaintiff's goods, such house being located in the city where there was danger from fire, was negligent conduct on the part of the defendant. *Id.*

NEGOTIABLE. See *Gaming Laws*, 1.

1. **NEGOTIABLE INSTRUMENTS — NOTICE.** — Where a bank in the absence of a director, by whom a note has been offered for discount, accepts it, and accepts a note payable to him and indorsed to it as collateral, its rights are not affected by such director's knowledge of illegality in the inception of the note accepted as security. *Third National Bank v. Harrison et al.*, 316
2. **SAME — SAME.** — An indorsee for value of a promissory note is presumed, in the absence of evidence to the contrary, to have taken it without notice of equities subsisting between the maker and payee. *Id.*
3. **SAME — COLLATERAL SECURITY — DEMAND — BANKING.** — Where a bank discounts a demand note for a depositor and receives another negotiable instrument as collateral, the liabilities of parties to the latter are not affected by a failure on the bank's part to make any attempt to collect such demand note when the maker has a sufficient sum on deposit to meet it. *Id.*

NEW SUIT. See *Deposition*, 1.**NEW TRIAL.** See *Practice*, 5.**NEWLY DISCOVERED EVIDENCE.** See *Equity*, 6.**NON-RESIDENT ALIEN.** See *Contract*, 12. *Legacy Tax*, 1.**NOTICE.** See *Fraud*, 2, 3. *Mining Claim*, 5, 6. *Negotiable Instrument*, 1, 2.

1. **COUNTY WARRANTS — CANCELLATION — NOTICE REQUIRED.** — The notice required to be given of the order of the county court calling in warrants for cancellation and reissue, under a statute, in Arkansas, is for the benefit of the warrant holders; and the county, which is suitor in the proceeding, cannot object that legal notice of such call was not given. *Cissell v. Pulaski Co.*, 446
2. **NOTICE — PUBLICATION, HOW PROVED — AFFIDAVIT.** — The affidavit, to prove the publication of a legal notice in judicial proceedings, must show that the paper in which the publication was made is one authorized to publish such notices, and that the affiant sustains the relation to the paper required by the statute to authorize him to make the affidavit. *Id.*
3. **SAME — CONSTRUCTIVE SERVICE — FACTS MUST AFFIRMATIVELY APPEAR.** — When it is sought to conclude a party by constructive

NOTICE — continued.

service, by publication, every fact necessary to the exercise of jurisdiction, based on such service, must affirmatively appear in the mode prescribed by the statute. *Id.*

4. **SAME — DEFECTIVE PROOF CANNOT BE SUPPLIED BY PAROL TESTIMONY.** — If the proof of publication contained in the record is defective, it is not competent for another court to receive parol testimony to supply the omission. *Id.*

5. **SAME — RECORD EVIDENCE OF NOTICE — PRESUMPTIONS.** — The recital of due notice in the record of a proceeding, under special statutory authority, must be read in connection with that part of the record which gives the official evidence prescribed by statute. No presumption will be allowed that other or different evidence was produced; and, if the evidence in the record will not justify the recital, it will be disregarded. *Id.*

NUDUM PACTUM. See *Title Bond*, 1.

OBLIGATION OF CONTRACTS. See *Municipal Bonds*, 4.

OFFICIAL BOND.

1. **OFFICIAL BONDS — LIABILITY OF SURETIES FOR OFFICERS HOLDING OVER.** — The sureties on the official bond of a surveyor general or register and receiver of the United States, whether appointed in California or elsewhere, are liable for a default of their principal occurring after the expiration of the principal's term of office and before his successor is appointed and qualified. *United States v. Jameson et al.*, 620

OPTION DEAL. See *Gaming Laws*, 1.

1. **OPTION DEALS.** — Contracts for the sale of property to be delivered at a future time at the plaintiff's option, where it was not the intention of the parties that the property should be delivered either by consignment or the transfer of warehouse receipts, but that said contracts should be adjusted and settled by the payment of differences, are void. *Melchert v. Am. Union Tel. Co.*, 521

PAROL EVIDENCE. See *Contracts*, 1, 9

PARTIES. See *Corporation*, 7. *Equity*, 15. *Warehouse*, 4.

PARTITION. See *Mining Claim*, 10.

PATENT. See *Letters Patent*.

PAYMENT.

1. **APPLICATION OF PAYMENTS.** — The rule as to voluntary payments is that the debtor may direct the application of such payments to one of several debts due from him to the creditor. *Nichols, Shephard & Co. v. Knowles*, 477

PAYMENT—continued.

2. **WHAT ARE VOLUNTARY PAYMENTS?**—A voluntary payment, within the meaning of this rule, is one made by the debtor on his own motion, and without any compulsory process. A payment made upon an execution does not fall within the rule. *Id.*
3. **APPLICATION OF PAYMENT—EQUITABLE RULE.**—Where three parties each held a judgment which was a lien upon the real estate of the same judgment debtor, entitled to share *pro rata* in the proceeds of the sale of said real estate, and where, by agreement between them, one of the three agreed to release his lien in consideration of the sum of \$450, which was paid to him by the other two: *Held*, that this was an enforcement of the judgment lien so released, to the extent of the sum paid for said release, to wit, \$450, and that said judgment should be credited with that sum; and that an agreement between the three lien holders, that said sum should be credited upon a junior judgment against the same judgment debtor, was void. *Seay v. Wilson, Assignee,* 121
4. **SAME — BANKRUPTCY — RIGHT OF ASSIGNEE IN EQUITY TO INSIST UPON SUCH APPLICATION.**—Where a creditor of a bankrupt has a lien upon the property of a third party as part of his security for a judgment against the bankrupt, he cannot release that lien for a consideration, without crediting such consideration on the claim against the bankrupt estate; and the fact that such a creditor had a second unsecured claim against such third party does not alter the case. *Id.*

PLEADING. See *Bill of Review*, 1, 2. *Corporation*, 7, 12. *Equity*, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17. *Master and Servant*, 4. *Verdict*, 1.

1. **PLEADING — GENERAL REPLICATION.**—The purpose of a general replication is to put in issue the new matter set forth in the answer. *Cavender v. Cavender,* 158
2. **SAME — EFFECT OF GENERAL DENIAL AS TO ADMISSIONS IN ANSWER.**—A complainant does not deprive himself of the benefit of admissions in the respondent's answer by a general denial of the allegations thereof. *Id.*
3. **SAME — SAME — EVIDENCE.**—Where a devise is alleged in the bill and admitted in the answer, it is not necessary, though proper, for the complainant to produce the will in evidence. *Id.*
4. **DEMURRER TO BILL — VERIFICATION — EQUITY RULE 81.**—A demurrer to a bill in equity should be certified by counsel to be, in their opinion, well founded in point of law, and supported by the affidavit of the defendant that it is not interposed for delay. *Secor et al. v. Singleton et al.,* 280
5. **PLEADING — DEMURRER.**—A demurrer admits all facts well pleaded, but not conclusions drawn therefrom by the pleader. *Pullman Palace Car Co. v. Mo. Pa. R'y Co. et al.,* 645

PLEADING — continued.

6. **PLEADING — GENERAL DENIAL.**— A general denial is not equivalent to a general issue at common law. It only puts the plaintiff to proof of his substantial allegations. If the defendant has an affirmative defense in the nature of an avoidance, he should plead it. *Walker v. Flint et al.*, 507
7. **SAME — STATUTE OF LIMITATIONS.**— The statute of limitations cannot be set up as a defense under a general denial. *Id.*

POOLING. See *Lease*, 5.

POSSESSION. See *Mining Claim*, 1.

POSSESSORY INTEREST. See *Mining Claim*, 10.

POSTMASTERS. See *Criminal Law*, 1.

POWER OF STATES. See *Corporation*, 6.

PRACTICE. See *Constitutional Law*, 2, 3. *Jurisdiction*, 9.

1. **PRACTICE — JOINT WRONGS — SEPARATE SUITS.**— Where several tortfeasors are each and all liable for the same wrongful act, a separate suit for damages may be maintained against each of them. *Keep v. Ind. & St. L. R'y Co. et al.*, 308
2. **PRACTICE — PRODUCTION OF BOOKS, ETC.**— In requiring the production of books or writings in evidence in actions at law, federal courts are not governed by the provisions of state statutes, but by the provisions of section 724, R. S. *Gregory v. C., M. & St. P. R'y Co.*, 374
3. **SAME — DISCRETION OF COURT.**— In introducing the production of books, etc., in evidence, the court will exercise its discretion, following the practice, in such cases, in chancery. *Id.*
4. **PRACTICE — DEMURRER TO EVIDENCE.**— If there is conflicting evidence on which the jury should pass, the court cannot draw to itself the decision of what the evidence or the weight of evidence establishes. *O'Neil v. St. L., I. M. & S. R'y Co.*, 423
5. **PRACTICE — TRIAL UPON AGREED STATEMENT OF FACTS — FRAUD ON JURISDICTION — NEW TRIAL.**— A new trial may be granted at the instance of a defendant against whom judgment has been rendered in a case tried upon an agreed statement of facts, upon proof of evidence having been brought to his knowledge after the trial, which he could not have previously discovered by the use of due diligence, showing the perpetration by the plaintiff of a fraud on the jurisdiction of the court. *Greenwall v. Tucker et al.*, 450
6. **SAME — JURISDICTION — FRAUD UPON.**— The transfer by a blank deed *mala fide*, without consideration, of the title to land in one state to a citizen of another, for the purpose of bringing suit in a federal court, will not enable the grantee to maintain a suit in ejectment in such court. *Id.*

PRACTICE — continued.

7. **PRACTICE — REHEARING.**— Where the court has passed upon all the issues necessary to determine the rights of the parties, a motion for rehearing will be denied. *Martindale v. Waas et al.*, 637
8. **SAME — RULES OF PRACTICE.**— A state law requiring a judge to give his decision in writing upon every issue made by the pleadings is not binding on the federal courts. *Id.*
9. **SAME — RULES OF PRACTICE IN FEDERAL COURTS.**— The equity practice and procedure of the federal courts is regulated by the rules promulgated by the supreme court of the United States. *Id.*
10. **PRACTICE — SERVICE OF SUMMONS — RETURN — R. S. Mo. § 3489.**— Where a foreign corporation is served with summons under a statute providing that service in such cases may be by delivering a copy of the writ and petition to any officer or agent of such company "in charge of any office or place of business" that it may have, the return of service should state that a copy of the writ and the petition were delivered to an officer or agent *in charge of an office or place of business* of the defendant. *Kiufeke v. Merchants' D. T. Co.*, 547

PRESENTATION OF CLAIM. See *Assignment*, 1.

PRESUMPTION. See *Insurance*, 9. *Notice*, 5.

PREVENTING — VOTING.

1. **PREVENTING CITIZEN FROM VOTING — INDICTMENT UNDER SECTION 5511, REV. ST. — NECESSARY AVERMENTS.**— An indictment designed to charge an offense under section 5511 of the Revised Statutes of the United States, for unlawfully preventing a qualified voter from exercising the right of suffrage, should charge the offender with interfering "at a congressional election" with a voter qualified to vote and offering to vote, for a representative in congress. *United States v. Cahill*, 200
2. **SAME — SAME.**— Such an indictment need not set out the facts on which depend the right of the person interfered with to vote. *Id.*

PRINCIPAL AND AGENT. See *Bankruptcy*, 3. *Evidence*, 1.

1. **PRINCIPAL AND AGENT — FRAUD OF AGENT — RETURN OF CONSIDERATION.**— Where a principal employs an agent to sell lands for him, and authorizes him to make contracts in his (the principal's) name, and the agent fraudulently buys some of the land in the name of a third party, and the principal executes a conveyance and receives certain bonds as the consideration, *held*, that the principal, upon being advised of the fraud, may repudiate the contracts upon returning to the agent the sum paid by him for the stock without any profits thereon. An agent will not be permitted to make any profit out of transactions connected with his agency, and if he be an agent to sell property, he

PRINCIPAL AND AGENT—continued.

must not be allowed to purchase it. *N. P. R. R. Co. v. Kindred Power et al.*, 627

2. **SAME—PROFITS BELONG TO PRINCIPAL.**—If an agent shall make any profits in the course of his agency by any concealed arrangement, either in buying or selling, or other transactions on account of his principal, such profits will belong exclusively to the latter. *Id.*

3. **SAME—SAME—RULE FOR ACCOUNTING AS TO PROFITS.**—Where an agent has fraudulently made profits out of his agency at the expense of his principal, he shall account for all such profits, and shall be allowed only the actual value of whatever he turns over to his principal; and if he turns over property purchased in the course of his agency, what he paid for it shall be considered its value. *Id.*

PRIVATE PROPERTY—PUBLIC USE. See *Constitutional Law*, 4.

PROBATE COURT. See *Injunction*, 1.

PROBATE—WILL. See *Jurisdiction*, 11, 12.

PRODUCTION—BOOKS. See *Practice*, 2.

PROOF OF PUBLICATION. See *Notice*, 2, 4.

PROSPECTING. See *Mining Claim*, 8.

PUBLIC OFFICER. See *Contract*, 12.

PUBLICATION. See *Notice*, 2.

PUBLIC LAND.

1. **PUBLIC LANDS—RIGHTS OF SETTLERS.**—Where a person enters upon public land with the view of pre-empting it, and before the expiration of the year during which he ought to have proven up his claim he homesteaded his pre-emption, the pre-emption as well as the homestead must have been taken in good faith for the purpose of residence, settlement and improvement.

Timber Cases, 519

2. **SAME—RIGHT TO CUT TIMBER.**—A person entering on the public land for the purpose of pre-emption, or to secure a homestead, in good faith, may cut the timber standing thereon for the purposes of cultivation, and after applying such portion as can be used for the improvement, he may sell or dispose of the balance.

Id.

3. **SAME—RESTRICTION AS TO RIGHT.**—A settler on the public lands has no authority to go outside of the improvements, cut or sell timber, and thus denude the land and destroy the value of the public domain, even though he intends to acquire the title under his claim. *Id.*

PUBLIC SCHOOL BUILDING. See *Surety*, 2.

PUBLIC USE. See *Constitutional Law*, 4.

PURCHASER—LOCATOR. See *Mining Claim*, 2. *Trust*, 1. *Vendor's Lien*, 4.

QUIET TITLE. See *Jurisdiction*, 10.

RAILROAD. See *Common Carrier*. *Ejectment*, 1. *Estoppel*, 2. *Right of Way*, 1. *Telegraph*, 4.

1. **RAILROAD LAND GRANTS.**—When the limits of two congressional railroad land grants made in the same act overlap, and there is no express priority in the disposition of such lands, or provision for the same, *held*, that each of the two railroads is entitled to an undivided half of the land. *C., M. & St. P. R'y Co. v. S. C. & St. P. R. Co.*, 280

2. **RAILROAD COMPANIES—PRESUMPTIONS AS TO EMPLOYEES AND MACHINERY.**—The law presumes that railroad companies employ for their service persons of reasonable competency and fitness for their duties; and this presumption exists till the company is notified of their incompetency and unfitness. The same rule substantially applies to the question of the sufficiency of the machinery employed. *Gravelle v. M. & St. L. R'y Co.*, 352

3. **RAILROAD—APPOINTMENT OF RECEIVER—SUPERINTENDENT.**—Under a stipulation in a lease executed by a railroad company, requiring the assent of the superintendent of the railroad to any assignment or subletting, where the railroad passes into the hands of a receiver appointed by the court, the superintendent who acts under the direction of the receiver is to be regarded as the superintendent of the railroad company for the purposes of such a contract. *K. C. Elevator Co. v. U. P. R. Co. et al.*, 463

4. **RAILWAY COMPANY—DUTY TO FENCE—IOWA STATUTE CONSTRUED—INJURY TO INFANT CHILD WHILE ON THE TRACK.**—Section 1289 of the code of Iowa of 1873, which provides that if a railway company fails to fence its road against live stock running at large, it shall be liable to the owner of any such stock killed or injured by its trains by reason of the want of such fence, unless the same was occasioned by the willful act of the owner or his agent, does not make it the duty of the company to fence its road, nor subject it to liability for injury to an infant child while on the track. *Walkenhauer v. C., B. & Q. R. Co.*, 553

5. **RAILROAD COMPANY—WAREHOUSEMAN—BAILEE FOR HIRE.**—A railroad company which keeps a warehouse for storing goods carried over its line until they shall be called for by the consignee, in respect to goods so carried and stored in its warehouse, is regarded as a bailee for hire, and is required to exercise the care and diligence of ordinary warehousemen in keeping such goods. *White, Adm'r, v. Colo. Cent. R. Co.*, 559

REAL PROPERTY. See *Estoppel*, 1.

RECEIVER. See *Equity*, 4. *Railroad*, 3. *Removal*, 7.

1. **RECEIVER—RIGHT TO SUE IN A FOREIGN JURISDICTION.**—The question of the right of a receiver to sue in a foreign jurisdiction considered but not finally decided. *Holmes et al. v. Sherwood et al.*, 405

RECITAL. See *Municipal Bonds*, 1.

RECOGNITION—STATE COURT. See *Municipal Bonds*, 2, 3.

RECORD EVIDENCE. See *Notice*, 5.

RE-ENTRY. See *Lease*, 1, 5.

REHEARING. See *Equity*, 6. *Practice*, 7.

RELIEF. See *Equity*, 3.

REMAND. See *Removal*.

REMEDY. See *Assignment*, 3. *Equity*, 5. *Negligence*, 4. *Warehouse*, 3.

REMOVAL. See *Constitutional Law*, 7. *Jurisdiction*, 13.

REMOVAL OF CAUSE AFTER JUDGMENT.—Where a supplemental proceeding is a mere mode of execution or relief inseparably connected with the original judgment or decree, it cannot be removed, although some new controversy or issue between plaintiff in the original action and a new party may arise out of the proceeding. But where such proceeding is not a mere mode of execution or relief, but involves an independent controversy with a new or different party, it may be removed into the federal court. *Buford & Co. v. Strother & Conklin*, 253

2. **SAME—CAUSE, WHEN REMANDED.**—Where the plaintiff in a suit in a state court obtained judgment against the defendant, garnished certain parties, and, after taking issue upon the answer of the garnishees, removed the issues thus made to the circuit court of the United States, *held*, on motion by the original defendant and the garnishees to remand the cause, that the motion be maintained on the ground that the proceedings are a mere mode of execution or relief, inseparably connected with the original judgment. *Id.*

3. **SAME—MOTION TO REMAND, WHEN DENIED.**—In an action in the state court against a corporation, incorporated under the laws of the state of Iowa, the plaintiff obtained judgment, and, upon a return of the execution unsatisfied, he proceeded against certain stockholders in the corporation under the provisions of chapter 181, title 9, of the state court, and removed these proceedings into the circuit court of the United States. *Held*, on

REMOVAL — continued.

motion to remand, that the motion be denied, on the ground that such proceedings involve an independent controversy with new parties, against whom the plaintiff seeks to establish a new liability. *Id.*

4. **REMOVAL OF CAUSE — INTERVENORS.**— Where the intervening petition charges fraud, and is not in the nature of a bill charging errors or irregularities merely, or where it charges want of jurisdiction and want of notice to complainants, and where no attack is made on any final judgment, but only on interlocutory orders still within the control of the state court, intervenors may remove the cause. *In re Iowa & Minnesota Const. Co.*, 310
5. **SAME — LOCAL PREJUDICE.**— Where there has been no final trial or hearing, intervenors may remove the cause on the ground of local prejudice, on compliance with the provisions of the act of congress. *Id.*
6. **SAME — HOW EFFECTED.**— The filing of the petition in the state court *ipso facto* removes the cause. *Id.*
7. **SAME — RIGHT OF REMOVAL — RECEIVER.**— The petition of intervention is in the nature of a suit for relief as against defendants therein named, and the right of removal is not affected by the fact that a receiver had been appointed by the state court to wind up the affairs of the corporation. *Id.*
8. **SAME — RIGHT OF INTERVENORS.**— The right of intervenors to a preliminary injunction to restrain further proceedings until there can be a hearing on the merits, follows as a matter of course. *Id.*
9. **EFFECT OF REMOVAL OF PART OF CAUSE FROM STATE COURT — RES ADJUDICATA.**— Where suit was brought in a state court against principal and surety upon the bond above mentioned, and removed, as to the surety, into the circuit court of the United States, under the act of congress of 1866, providing for the removal of part of a cause: *Held*, that from the time the order of removal was made, the surety passed from the jurisdiction of the state court and had no right to appear there any further, and is, therefore, not bound by the judgment there against the principal. A party is bound by an adjudication only where he is so far within the jurisdiction of the court as to be at liberty to participate in the management and control of the litigation. *State of Missouri v. Tiederman*, 400
10. **REMOVAL OF CAUSES — LOCAL PREJUDICE — CITIZENSHIP.**— Under the third subdivision of section 639 of the Revised Statutes of the United States, commonly known as "the local prejudice act," it is not necessary in order to the removal of a cause that it should appear from the record that the parties were citizens of

REMOVAL — continued.

different states at the time that the suit was commenced. *Miller v. C., B. & Q. R. Co.*, 460

11. **REMOVAL OF CASES FROM STATE COURTS** — **SECTION 2 OF THE ACT OF MARCH 3, 1875, CONSTRUED.** — A case cannot be removed from a state court to a circuit court of the United States, as to one defendant, and left pending in the state court as to another. *Chambers v. Holland*, 538

12. **REMOVAL** — **ACTION ARISING UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES** — **UNION PACIFIC RAILWAY CO.** — A suit brought by or against the Union Pacific R'y Co., a corporation formed under an act of congress as shown by the record in this case, is not necessarily a suit arising under the laws of the United States, so as to be removed on that ground from a state to a federal court. *Meyers v. U. P. R'y Co.*, 578

13. **SAME** — **SAME.** — A suit cannot be removed upon the sole ground that it is a suit by or against a corporation organized under the laws of the United States. *Id.*

14. **JOINT TORTFEASORS** — **SEVERABLE ACTION** — **RIGHT OF REMOVAL.** Where an action is brought against a resident and non-resident defendant sounding in tort, and each is liable as a wrongdoer, and the controversy is severable, the party bringing the suit cannot, by joining the non-resident defendant, debar him from asserting a right given by the act of 1875. *Clark v. C., M. & St. P. R'y Co.*, 591

15. **REMOVAL OF CAUSE** — **ACT OF 1866.** — The second subdivision of section 639 of the Revised Statutes was repealed by the act of 1875, so far as subdividing the cause of action. *Id.*

16. **SAME** — **ACT OF 1875.** — Where the petition contains all the jurisdictional facts necessary to effect a removal under the second clause of the second section of the act of March 3, 1875, but the prayer of the petition did not ask for the removal of the entire suit, the cause will be remanded. *Id.*

17. **SAME** — **JURISDICTION.** — When a sufficient case for removal is made in the state court, the jurisdiction of that court is at an end, and the jurisdiction of the federal court attaches; and the fact that only a part of the record is filed in the federal court will not oust its jurisdiction. *Id.*

RENTS. See *Lease*, 2.

REPEAL. See *Statute*, 5.

RES ADJUDICATA. See *Removal*, 9.

RESTRAINT OF TRADE. See *Contract*, 7. *Trusts*, 2.

RETURN. See *Practice*, 10.

RETURN OF CONSIDERATION. See *Principal and Agent*, 1.

REVENUE

1. **REVENUE ACTS OF MISSOURI OF MARCH 3, 1872, AND MARCH 21, 1873—ASSESSMENT OF TAXES.**—The Missouri revenue acts of 1872 and 1873 require land situate in St. Louis county to be assessed, not numerically, but alphabetically, in the name of the person owning or holding it, and such person is liable for the taxes thereon. *Greenwalt v. Tucker*, 166
2. **SAME—SAME.**—Where a person who has purchased a piece of land gives a deed of trust thereon to secure the purchase money, but remains in possession, he does not cease to be the owner or holder of the property within the meaning of said statutes. *Id.*
3. **SAME—SAME.**—Said statutes authorize proceedings against the realty itself. *Id.*
4. **SAME—SAME—EJECTMENT—EFFECT OF A SALE FOR TAXES UPON THE RIGHTS OF PARTIES CLAIMING UNDER A DEED OF TRUST AND CONVEYANCES THEREUNDER.** *Id.*

REVIEW. See *Bill of Review*, 1, 2.

REVISED STATUTES. See *Statutes*.

RIGHT OF WAY. See *Ejectment*, 1. *Estoppel*, 2. *Telegraph*, 1.

1. **RIGHT OF WAY OF A RAILWAY—FEE OF THE LAND.**—The question whether a railroad company may acquire the fee of land or right of way, under the statute of Iowa, suggested but not decided. *W. U. Tel. Co. v. B. & S. W. R'y Co.*, 130

RIPARIAN RIGHTS

1. **RIPARIAN RIGHTS—DIKES—DAMAGES.**—Where a city, by authority of an act of the legislature of the state in which it is situated, builds a dike extending into a navigable river, owners of land on the opposite shore and in another state, who suffer no loss in consequence of the erection of the dike, cannot maintain actions against the city for damages. *Rutz v. City of St. Louis*, 261

SALE—TAX. See *Revenue*, 4.

SALE OF GOODS. See *Fraud*, 1, 3.

SCIRE FACIAS. See *Judgment*, 2.

SECURITY. See *Vendor's Lien*, 2.

SEIZURE OF LIQUORS. See *Indian Country*, 2.

SEPARATE PROPERTY. See *Attachment*, 2.

SEPARATE SUITS. See *Practice*, 7.

SERVICE. See *Notice*, 3. *Practice*, 10.

SET-OFF.

1. **SET-OFFS — ATTORNEY'S LIENS — JUDGMENTS.**— An attorney's lien upon a judgment is subject to any existing right of set-off in the other party to the suit. *Nat. Bank Winteraset v. Eyre et al.*, 175

SETTLERS. See *Public Lands*, 1.

SEVERABLE ACTION. See *Removal*, 14.

SPECIFIC PERFORMANCE. See *Title Bonds*, 1.

STAMPS. See *Internal Revenue*, 3, 4.

STATE — POWER. See *Corporation*, 6.

STATE COUPON BONDS. See *Statute*, 1.

STATE COURTS. See *Taxation*, 1. *Jurisdiction*, 13.

STATE CONSTITUTION. See *Constitution*.

STATE STATUTES. See *Statutes*.

STATUTES — FEDERAL

- Act of 1834, June 30, see *Indian Country*, 1.
- Act of 1850, September 20, see *Swamp Lands*, 1.
- Act of 1866, see *Removal*, 9, 15.
- Act of 1866, July 24, see *Telegraph*, 1.
- Act of 1870, July 8, see *Letters Patent*, 6.
- Act of 1870, July 14, see *Legacy Tax*, 1.
- Act of 1875, see *Bankruptcy*, 1. *Jurisdiction*
- Act of 1875, March 3, see *Removal*, 11, 14, 16.
- Act of 1879, June 30, see *Criminal Law*, 1.
- Rev. Stat., sec. 629, see *Jurisdiction*, 6. *Statutes*, 8.
- Rev. Stat., sec. 639, see *Removal*, 10, 15.
- Rev. Stat., sec. 721, see *Evidence*, 4.
- Rev. Stat., sec. 724, see *Practice*, 2.
- Rev. Stat., sec. 740, see *Jurisdiction*, 7.
- Rev. Stat., sec. 1037, see *Indictment*, 1.
- Rev. Stat., sec. 2140, see *Indian Country*, 2.
- Rev. Stat., sec. 3425, see *Internal Revenue*, 3, 4.
- Rev. Stat., sec. 5017, see *Bankruptcy*, 3.
- Rev. Stat., sec. 5511, see *Preventing Voting*, 1, 2.
- Rev. Stat., sec. 5596, see *Indian Country*, 1.

STATUTES — STATE.

- Arkansas, see *Common Carrier*, 9.
- Colorado Code, §§ 111, 112, see *Attachment*, 1.
- Iowa, Code 1878, § 1289, see *Railroad*, 4.
- Kansas, see *Homestead*, 1.

STATUTES — STATE — continued.

- Minnesota, see *Chattel Mortgage*, 1. *Warehouse*, 1, 2.
 Minnesota, Gen. St., ch. 73, § 29, see *Evidence*, 4.
 Minnesota, Gen. St., ch. 77, § 1, ch. 53, § 19, see *Judgment*, 1.
 Missouri, see *Common Carrier*, 9. *Judgment*, 2.
 Missouri, 1865, February 20, see *Statutes — State*, 1.
 Missouri, 1872, March 3, see *Revenue*, 1, 2, 3,
 Missouri, 1873, March 21, see *Revenue*, 1, 2, 3, 4.
 Missouri, 1875, February 19, see *Municipal Bonds*, 4.
 Missouri, 1881, March 29, see *Statutes — State*, 3.
 Missouri, R. S., § 744, see *Corporation*, 10.
 Missouri, R. S., § 8489, see *Practice*, 10.
 Missouri, R. S., §§ 5722-3, see *Gaming Laws*, 1.
 Nebraska, see *Corporation*, 1, 2, 5. *Jurisdiction*, 11.

1. ACT OF THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI TO PROVIDE FOR REDUCING THE INDEBTEDNESS OF THE STATE, APPROVED FEBRUARY 20, 1865, CONSTRUED — STATE COUPON BONDS — LOAN OF CREDIT TO R. Co. — WHAT CONSTITUTES PAYMENT OF INDEBTEDNESS REPRESENTED BY OUTSTANDING BONDS WITH COUPONS NOT YET DUE — RIGHT TO ENFORCE LIEN UPON FAILURE TO PROVIDE FOR PAYMENT OF COUPONS FALLING DUE AFTER ATTEMPTED DISCHARGE OF THE ENTIRE INDEBTEDNESS. *Ralston et al. v. Crittenden, Gov., etc.*, 332
2. SAME — ARTICLE 4, § 50, AND ARTICLE 15, § 1 OF THE SCHEDULE OF THE CONSTITUTION OF THE STATE OF MISSOURI OF 1875, CONSTRUED. — Said act of 1865 was not repealed by the articles of the constitution of the state of Missouri, approved November 30, 1875, by which it is provided that the general assembly shall have no power to release, alienate, or alter the lien held by the state upon any railroad, but that the same shall be in force in accordance with the original terms upon which it was acquired, and that the provisions of all laws inconsistent with said constitution should cease upon its adoption. *Id.*
3. ACT OF MARCH 29, 1881, CONSTRUED. — Where the legislature of the state, in anticipation of the payment into the treasury of \$3,000,000 on account of the state's claim against the railroad under the legislation above named, provided for the investment of the same so as to cancel outstanding obligations of the state bearing interest, and so as to earn an income, and making it the duty of certain officers of the state to make such investment, *held*, that as between the state and the railroad company in a settlement of their differences touching the duty of the company to provide for outstanding and unmatured interest coupons, the state is chargeable in equity with whatever would have been realized if said sum had, when paid in, been invested as required by the act. *Id.*

STATUTES — STATE — continued.

4. **STATUTE — WHEN TO BE CONSTRUED AS MANDATORY.**— Even where the terms of a statute are permissive only, and merely authorize a public officer to do a certain act, it will be construed as mandatory, if the public interest or individual rights call for the exercise of the power conferred. *Id.*
5. **STATUTES — CONSTRUCTION OF — REPEAL BY IMPLICATION.**— An earlier statute is only repealed by a later one when their provisions cannot be reconciled. *Third Nat. Bank v. Harrison et al.*, 162
6. **SAME — SAME.**— A later statute which is general and affirmative in its provisions will not abrogate a former one which is particular or special. *Id.*
7. **SAME — SAME.**— An exposition of a statute which will revoke or alter by construction of general words a previous general statute should not be adopted where the words may have their proper operation without it. *Id.*
8. **ACT OF MARCH 3, 1875, CONSTRUED.**— The act of March 3, 1875, “to determine the jurisdiction of the circuit courts of the United States, to regulate the removal of causes from the state courts, and for other purposes.” did not repeal subdivision 10, § 629, of the Revised Statutes. *Id.*

STATUTE OF LIMITATIONS.

1. **STATUTES OF LIMITATIONS.**— State statutes of limitations do not run against claims of the United States. *United States v. Spiel*, 107

STATUTORY ACTION. See *Jurisdiction*, 9.

STATUTORY BOND. See *Attachment*, 1.

STEALING — MAILS. See *Constitutional Law*, 2.

STOCKHOLDER. See *Corporation*, 8.

1. **STOCKHOLDERS’ LIABILITY — ASSESSMENT.** — Where the stockholders as a corporation are liable to the full amount of their unpaid subscriptions, an assessment before suit is not necessary. The stockholders, within the jurisdiction, may be required to pay the sums due from them, so far as required, to pay the judgments sued on, and if there are other delinquent stockholders outside of the jurisdiction, the stockholders sued must look to them for contribution. *Holmes et al. v. Sherwood et al.*, 405

SUBLETTING. See *Lease*, 3, 4.

SUBROGATION. See *Corporation*, 7.

SUNDAY CONTRACT. See *Contract*, 10.

SUPERINTENDENT. See *Railroad*, 8.

SURETY. See *Official Bond*, 1.

1. **SURETY — HOW FAR BOUND BY THE JUDGMENT AGAINST HIS PRINCIPAL IN A SUIT TO WHICH HE IS NOT A PARTY.**— A party sued as surety upon a bond given to secure the faithful performance of a contract by the principal, to construct a school-house within a specified time, upon certain terms and conditions, is not bound by a judgment against his principal, in a suit to which he is not a party, establishing certain claims as mechanics' liens upon such school-house. *State of Missouri, etc. v. Tiederman*, 399
2. **SAME — MECHANIC'S LIEN — PUBLIC SCHOOL BUILDING.**— It having been settled by repeated decisions of the supreme court of Missouri, that there can be no such thing as a mechanic's lien upon a public school building, a surety upon such a bond as the one above named may, in defending a suit upon the same, deny the validity of a judgment establishing such a lien, so far as he is concerned, such a judgment having been rendered in a suit to which he was not a party, *Id.*
3. **SURETY — RIGHTS OF, IN SETTLEMENT WITH THE OBLIGEE IN THE BOND.**— A surety is not bound by a settlement between his principal and the obligee of the bond, to which he has not assented; but has a right to a settlement of his liability precisely as if he had been present at such settlement, and had availed himself of all his rights and of all the defenses which the principal could have availed himself of. *Id.*

SWAMP LAND.

1. **SWAMP LANDS — ACT OF CONGRESS — WHEN TO TAKE EFFECT.**— Title to swamp land was not vested by the act of congress of September 28, 1850, until the admission of a territory into the Union. Hence, the state of Minnesota not having been admitted into the Union at the date of the passage of the act granting lands to the territory or future state of Minnesota for the construction of railroads, approved March 3, 1857, a grantee of the state, by virtue of the acts of the legislature approved March 8, 1861, and March 4, 1864, has a good title as against one whose title depends upon the proper construction of the acts of congress approved September 28, 1850, and March 12, 1860. *S. C. & St. P. R. Co. v. Rice*, 410

TAX SALE. See *Revenue*, 4.**TAXATION.** See *Revenue*, 1, 4.

1. **TAXATION — DECISIONS OF STATE COURTS GOVERN.**— The decision of the highest court of a state upon a question of local taxation is conclusive. *Secor et al. v. Singleton et al.*, 290

TAXATION — continued.

2. **SAME — EXEMPTIONS.**— Where the stock of a company is by law exempt from taxation, its property cannot be taxed. *Scotland County v. Missouri, Iowa & Nebraska R. Co.* 65 Mo. 120. *Id.*

TAXES. See *Lease*, 2. *Revenue*, 4.

TELEGRAPH.

1. **TELEGRAPH COMPANY — CONTRACT FOR EXCLUSIVE RIGHT OF WAY ALONG THE LINE OF RAILROAD.**— It is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing a line of telegraphic communication along its right of way. Such a contract is void, as being in restraint of trade, contrary to public policy, and in violation of the act of congress of July 24, 1866 (14 Stat. 221). *W. U. Tel. Co. v. B. & S. W. R'y Co.*, 130
2. **TELEGRAPH POLES AND WIRES — ARE THEY REAL OR PERSONAL PROPERTY?**— Whether the telegraph poles and wires and instruments used in the construction of a line of telegraph are to be considered as part of the real estate to which they are annexed, may depend upon the intent with which they were erected, and if the parties in interest agree or intend that they shall remain personalty, subject to be removed, such agreement will be enforced. *Id.*

TENDER. See *Contract*, 5, 9.

TIMBER. See *Public Land*, 2.

TIME — ESSENCE. See *Contract*, 3.

TITLE. See *Warehouse*, 1, 2.

TITLE BONDS.

1. **TITLE BONDS — NUDUM PACTUM — BILL FOR SPECIFIC PERFORMANCE.**— Where a bill for specific performance was brought, based upon a title bond, whereby the obligors bound themselves to convey certain property to the obligees upon certain payments being made, *held*, that such a bond could not be enforced for want of consideration. *Smith & Downs v. Reynolds*, 157

TRANSFER. See *Indictment*, 1.

TRESPASSER. See *Mining Claim*, 7.

TRIAL. See *Practice*, 5, 6.

1. **TRIAL BY JURY IN CRIMINAL CASE — JURY MUST DELIBERATE AND DECIDE.**— Under the sixth amendment to the constitution, which guarantees to every accused person the right to a speedy and public trial by an impartial jury, etc., there must be a submission of the case to the jury for their consideration and decision,

TRIAL—continued.

and the jury must deliberate upon and determine it. *United States v. Taylor*, 500

2. **SAME—TO WHAT EXTENT THE JURY MAY JUDGE OF BOTH LAW AND FACT.**—The right of the jury in criminal cases to pass upon questions both of law and fact is the necessary result of the jury system, so long as the right of the jury to find a general verdict remains; for a general verdict necessarily covers both the law and the fact, and embodies a decision based upon and growing out of both. *Id.*
3. **SAME—SAME—DUTY OF THE JURY TO RECEIVE THE LAW FROM THE COURT.**—While the court is the judge of the law, and may instruct the jury upon the law, and while it is the duty of the jury to receive the law from the court, it is still within the power of the jury to render a general verdict, and thereby to decide on the law as well as the facts. *Id.*
4. **SAME—SAME.**—Ruling of Justice Hunt in *The United States v. Anthony*, 11 Blatchford, 200, considered and dissented from. *Id.*
5. **SAME—SAME—RIGHT OF JURY TO DISBELIEVE WITNESSES.**—Although the defendant in a criminal case calls no witness to contradict the witness for the prosecution, yet the jury may still judge of the credibility of those witnesses, and may consider whether, upon applying all the tests of manner, clear or confused statement, prejudice, and accuracy of memory, they are to be believed. *Id.*
6. **SAME—SAME—CHARGE TO FIND VERDICT OF GUILTY.**—It is error for the court to charge the jury to find a verdict of guilty, even in a case where, in the opinion of the court, guilt is established beyond dispute. *Id.*
7. **TRIAL OF CAUSES OF A LIKE NATURE AT THE SAME TIME—R. S. § 921.**—Federal courts have authority to order causes pending before them of a like nature, and in which substantially the same questions are involved, though against different defendants, to be tried at the same time, even where, in consequence, the defendants will be brought into antagonism. *Keep v. I. & St. L. R. Co.*, 302
8. **SAME—JUDGMENTS.**—Where causes, one of which sounds in tort and the other in contract, are tried at the same time, separate judgments may be rendered in each. *Id.*

TROVER. See *Action*, 2.

1. Trover lies for the value of goods illegally withheld under claim of lien for freight money. *Marsh v. U. P. R'y Co.*, 236

TRUST. See *Assignment*, 4. *Revenue*, 4.

1. **TRUST—FRAUDULENT CONVEYANCE—SUBSEQUENT PURCHASER WITH NOTICE.**—A subsequent purchaser with notice from a

TRUST—continued.

fraudulent vendee may in equity be charged as trustee, but to the extent only of the interest which the vendor had at the time of the sale. *Rogers v. Marshall et al.*, 76

2. **TRUSTS — DUTY OF TRUSTEE — INVESTMENT OF FUND — NEGLIGENCE OF DUTY — INSOLVENCY — REMOVAL — APPOINTMENT OF NEW TRUSTEE — HIS DUTIES.** *Cavender v. Cavender*, 158

3. **TRUST DEED — EXPENSES OF EXECUTING TRUST.**— Where a trust deed conveyed a large body of lands to trustees to secure the payment of a large number of bonds and the interest thereon, the bonds having a long period of time to run, and where the grantor in said trust deed retained the right to make sales of said lands and pay over to the trustees the proceeds of such sales after deducting the expenses of executing the trust, it was held that the grantor had the right to retain the reasonable expenses incurred by it in making such sales. *Held*, further, that said grantor had the right to pay legal taxes from such proceeds. *Nickerson et al., Trustees, v. A., T. & S. F. R'y Co.*, 445

UNDUE INFLUENCE. See *Assignment*, 5.

UNION OF CONTROVERSY. See *Jurisdiction*, 5.

UNION PACIFIC R'Y CO. See *Removal*, 12, 13.

UNSKILLFULNESS. See *Common Carrier*, 21.

VALIDITY. See *Municipal Bonds*, 2, 3.

VENDOR'S LIEN.

1. **VENDOR'S LIEN — EQUITABLE OWNERSHIP OF THE VENDOR.**— A person who has purchased real estate and paid for it and has a right to a deed in his own name, and who sells the same to a purchaser and causes conveyance to be made direct to such purchaser by the party from whom he has purchased, has a right in equity to a vendor's lien for the purchase money. *Loomis v. D. & St. P. R. Co. et al.*, 489
2. **SAME — WAIVER OF LIEN BY TAKING COLLATERAL SECURITY.**— A vendor's lien is defeated by any act upon the part of the vendor manifesting an intention not to rely upon the land for security; as for example, accepting a separate and distinct security, such as a mortgage or bond or note with security. But where the vendor took the vendee's draft for the purchase money as payment, and not as security, and said draft was not paid by the drawee, it was held that the lien was not waived. *Id.*
3. **SAME — MORTGAGE — AFTER-ACQUIRED PROPERTY.**— Where the vendor conveyed land to a railroad company which had previously executed a mortgage covering after-acquired property, *held* that such mortgage became a lien upon such land subject to

VENDOR'S LIEN — continued.

the claim of the grantor for purchase money. As to after-acquired property the mortgagee is not a purchaser for value. *Id.*

4. **SAME — BONA FIDE PURCHASER — LIS PENDENS.**— Where, in a suit in the United States circuit court to foreclose a mortgage upon a railroad, one of the defendants asked and obtained leave to proceed in a state court to establish his vendor's lien upon the road, which he did, and where various other proceedings were had as shown in the opinion in both the courts touching the suit to enforce such vendor's lien, *held*, that a purchaser of the railroad property at the foreclosure sale was charged with notice of the proceedings in both courts. *Id.*

VERDICT. See Trial by Jury.

1. **VERDICT — DEFECTS IN PLEADING CURED BY.**— It is too late after verdict to object that the assignee alleged that he purchased such ticket, when the proof shows that it was bought by others, or that he failed to allege a failure on the part of the contracting company to redeem the ticket. *Hudson v. K. P. R'y Co.*, 249

VOLUNTARY PAYMENTS. See Payment, 2.
VOTING. See Preventing Citizen, 1.
WAIVER. See Lien, 1. Vendor's Lien, 2.
WAREHOUSE. See Negligence, 5, 6, 7. Railroad, 5.

1. **WAREHOUSE RECEIPTS FOR GRAIN STORED — EVIDENCE OF TITLE — STATUTE CONSTRUED.**— The statute of Minnesota provides that when grain is deposited in a warehouse, elevator or other depository for storage, the same shall constitute a bailment and not a sale, and that the bailee shall execute to the person so storing the same a receipt or other written instrument, stating the amount, kind and grade of the grain stored, the terms of the storage, and, if advances are made, the words "advance made," which receipts shall be *prima facie* evidence that the holder thereof has in store with the party issuing such receipt the amount of grain of the kind and grade mentioned in such receipt. *Held*, under said statute, that a receipt issued to an actual depositor of grain, stating that he has deposited with the proprietor of a grain elevator at Litchfield, Minn., a given quantity of a certain quality of wheat, "to be carried at the convenience of the railroad company to St. Paul or Minneapolis for storage or delivery," was such an instrument as constitutes *prima facie* evidence of title to the amount and grade of grain mentioned therein. *Greenleaf et al. v. Dows et al.*, 27
2. **SAME — SAME — SAME.**— *Held* further, that a certificate stating that a depositor of grain has surrendered his warehouse receipts

WAREHOUSE—continued.

or elevator tickets for a certain quantity of a given grade of wheat, although issued by the proprietor of the elevator for wheat in the elevator sold by him, was not a warehouse receipt, and no evidence, under the statute, of title in the holder to any of the wheat in the elevator as against holders of such receipts as the statute recognizes. *Id.*

3. **EQUITY JURISDICTION — REMEDY AT LAW.**— Where there are several depositors of grain in a warehouse, each claiming a given quantity, the aggregate of their claims being more than the whole quantity of grain in such warehouse, a court of equity has jurisdiction of a bill filed by one or more of such claimants for a discovery and an accounting between the parties, and such jurisdiction is not defeated if upon the accounting it appears that the complainants are entitled to payment in full, and might have sued at law. *Id.*

4. **CONVERSION BY ONE OF SUCH CLAIMANTS — NECESSARY PARTIES TO SUIT.**— Where one of several claimants of grain in an elevator takes possession of such grain and converts it to his own use, he is liable to account to the other claimants for the full value of their respective interests therein; but before entering final decree the court will take care that all claimants of such grain, or of any interest therein, are before it. *Id.*

WIFE. See *Homestead*, 1.

WILL. See *Probate — Will*.

WITNESS. See *Evidence*, 1. *Trial*, 5.

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